89- 1598

No.

in the Supreme Court of the United States

OCTOBER TERM, 1989

EASTERN AIRLINES, INC.,

Petitioner,

versus

ROSE MARIE FLOYD and
TERRY FLOYD, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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April 9, 1990

QUESTIONS PRESENTED

1. Whether, in view of the presumed liability under the Warsaw Convention for death, wounding or any other bodily injury, an air carrier is liable for fright, psychic injury or emotional distress absent objective bodily injury or absent any physical manifestation of injury?

2. Whether the Montreal Agreement, which modifies the Warsaw Convention and which eliminates an air carrier's "due care" defense, makes international air carriers the insurers of their passengers against any fright, psychic injury or emotional distress absent a showing of objective bodily injury or absent physical manifestations of injury?

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioner, Eastern Airlines, Inc.,[1] and the following plaintiffs below and respondents to this petition (listed as they appeared in the style of the case):

ROSE MARIE FLOYD and TERRY FLOYD, her husband, CONNIE GALE and MICHAEL GALE, her husband, MICHAEL GALE and CONNIE GALE, his wife, GLORIA PATTERSON, EDMOND PATTERSON, THOMAS J. NOLAN, ROBERT SCHARHAG, EUGENE H. CHAMP, FREDERICK W. HOEHLER IV, SALLY ANN COLLINS, MICHAEL R. DRAMIS, SANDY DIX and GARY DIX, her husband, DANA DIX, by and through her parents GARY DIX and SANDY DIX, as guardians and next friends, ALEXANDER DIX, by and through his parents GARY DIX and SANDY DIX, as guardians and next friends, GERRI ASH SEIF, SUSAN ROONEY and WILLIAM ROONEY, her husband, JANET JACOBS and BRUCE JACOBS, her husband, ALEXANDER EMBRY, SALIM KHOURY and DEBORAH KHOURY, his wife, BRUCE JACOBS and JANET JACOBS, his wife, MYRIAM CARRASCO (f/k/a MYRIAM RILEY), TERRY FLOYD and ROSE MARIE FLOYD, GARY DIX and SANDY DIX, his wife, SALIM KHOURY and DEBORAH KHOURY, his wife, GREGORY MANTZ, by and through his parents, NETTA MANTZ and HAROLD D. MANTZ, as guardians and next friends, NETTA MANTZ, HAROLD MANTZ, GREGORY D. MANTZ, by and through his father HAROLD D. MANTZ.

[1] In response to Rule 28.1, Petitioner Eastern states that it is a subsidiary of Texas Air Corporation and that the following is a list of Eastern's subsidiaries: Airport Ground Services Corporation, Dorado Beach Development, Inc., Dorado Beach Estates, Inc., EAL, Inc., EAL Properties, Inc., Eastern Airlines Leasing, Inc., Eastern Airlines of Puerto Rico, Inc., Ionosphere Clubs, Inc., JCSS Corporation, Protective Services Corporation, Terminal Sales Company.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Eastern Airlines, Inc., ("Eastern") requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this action on May 5, 1989, which reversed a final judgment of the United States District Court for the Southern District of Florida.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1-54) is reported at 872 F.2d 1462. The opinion of the district court (Pet. App. B-1-21) is reported at 629 F.Supp 307.

JURISDICTION

The opinion of the court of appeals (Pet. App. A-1-2) was entered on May 5, 1989. A timely petition for rehearing with a petition for rehearing *en banc* was denied on January 11, 1990 (Pet. App. D-1-2). The jurisdiction of this Court rests upon 28 U.S.C. §1254 (1).

TREATY PROVISION INVOLVED

The treaty provision involved is Article 17 of the Warsaw Convention, which Convention is formally known as the Convention for the Unification of Certain Rules Relating To International Transportation By Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C.A. Section 1502 note (1970). Article 17 is set forth below:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

STATEMENT OF THE CASE

Respondents Floyd[1], were passengers on an Eastern flight from Miami, Florida to Nassau, Bahamas. Shortly after takeoff, one of the aircraft's three engines failed. The plane was turned around for a landing in Miami, and on the return, the aircraft's other two engines failed. As the aircraft lost altitude because of the engine failure, the passengers

[1]As there were 25 consolidated cases in this action, Eastern will refer to all of the plaintiff/respondents collectively as "Floyd".

and crew were prepared for ditching. The flight crew subsequently restarted one of the engines, and the aircraft safely landed at Miami International Airport.

Floyd brought actions for damages alleging mental pain and anguish, fright, distress and inability to lead normal lives as a result of the incident.[2] The complaints did not allege that plaintiffs suffered any bodily or physical injury or any physical manifestations of psychic injury.

The Warsaw Convention. The Convention is a treaty governing international aviation to which more than 120 nations now adhere. The Convention's primary purposes are to establish a uniform body of rules to govern international aviation and to set limits on carrier liability. *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243 (1984). The Convention applies to "*all* international transportation of persons, baggage, or goods performed by aircraft for hire." (Warsaw Convention, Article 1.) (Emphasis supplied.) It establishes uniform rules for passenger damage claims. *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

The controversy focuses upon the proper construction of Article 17 of the Convention, which creates a presumption of carrier liability for death or bodily injury as follows:

> The carrier shall be liable for damage sustained in the event of the death or **wounding of a**

[2]Another passenger on this flight whose case was not consolidated herewith, proceeded in a Florida state court. That case was recently decided by the Florida Supreme Court, *Eastern Airlines, Inc. v. King*, ____ So.2d ____, 15 F.L.W. 61 (Fla. Feb. 15, 1990) and is also reprinted in Pet. App. C-1-14. The allegations of that complaint are identical to the facts here. The Florida court determined that the plaintiff in *King* failed to state a claim under Florida law for intentional infliction of emotional distress, but followed the Eleventh Circuit Court of Appeals in *Floyd* in finding that the plaintiffs did have a claim for recovery under the Warsaw Convention for pure emotional injury unaccompanied by physical manifestations.

passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Since the text of the Convention is in the French language, the relevant French text is quoted as follows:

> Le transporteur est responsable du dommage survenu en cas de mort, **de blessure ou de toute autre lesion corporelle** subie par un voyageur lorsque l'accident qui a cause le dommage s'est produit a bord de l'aeronef ou au cours de toutes operations d'embarquement et de debarquement.

The phrase "lesion corporelle" is literally translated as "bodily injury." 49 Stat. 3014, reprinted at note following 49 U.S.C. Section 1502. The decision below broadly construed "lesion corporelle" to encompass recovery for fright, psychic injury or emotional distress unaccompanied by any "wounding. . .or any other bodily injury," and unaccompanied by physical manifestations of psychic injury. (App. A-22). The decision below expands an air carrier's liability well beyond that intended by the framers of the Convention.

The Montreal Agreement. Because of dissatisfaction in the United States with the Convention's low limits of liability,[3] the major international air carriers, at the urging of the United States State Department, met in Montreal, to increase their liability limits. This arrangement became known as the "Montreal Agreement."[4] It modifies the Convention only as the terms of the Convention permit it to be modified and only in accordance with the contracting carriers' intent.

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[3]The liability limit was fixed at $8,300 by the Convention. *Chan v. Korean Airlines, Ltd.*, ____ U.S. ____, 109 S.Ct. 1676, 1678 (1989).

[4]Officially titled: Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, 31 Fed.Reg. 7302 (1966), note following 49 U.S.C. App. §1502.

In the Montreal Agreement, the signatories agreed to include within their conditions of carriage and tariffs a provision raising the liability limit to $75,000 on international flights serving the United States. The parties further agreed to include a provision waiving the right to assert the "due care" defense of Article 20, "with respect to any claims arising out of the death, wounding or other bodily injury to a passenger. . . ." *See also, Day v. Trans World Airlines*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

Therefore, the Montreal Agreement is a special contract pursuant to Article 22(1) of the Convention between the airline signatories and their passengers imposing on air carriers liability for their passengers' bodily injuries *without a showing of fault*.[5] The Montreal Agreement did not amend Article 17; it did not modify the phrase "lesion corporelle." In fact, the drafters did not discuss or define the phrase "lesion corporelle" at either the Warsaw Convention or during the Montreal Agreement. *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 358 N.Y.S.2d 97, 105, 314 N.E.2d 848, 854 (N.Y. 1974). However, despite the fact that the parties to the Montreal Agreement did not intend to expand their liability under Article 17, the Eleventh Circuit's decision below has the effect of making air carriers absolutely liable for a broadened category of injuries without a showing of fault and without a showing of physical manifestations of injury.

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[5]An air carrier has been held absolutely liable for its passengers' death or bodily injuries occurring during an incident of international transportation even when the injuries were caused by a third party. *Day v. Trans World Airlines, Inc., supra*, 528 F.2d at 33 (2d Cir. 1975) (in suit against airline for damages resulting from terrorist attack, only inquiry was whether passengers were injured and whether they were injured on an international flight).

The defense of contributory negligence is still available under Warsaw Convention, Article 21. The death or bodily injury must be caused by an "accident." *Air France v. Saks*, 470 U.S. 392 (1985).

The Proceedings Below. The actions commenced in state court and were removed pursuant to the federal court's treaty jurisdiction and consolidated. (App. B-13). Floyd's complaints sought damages for purely emotional injury pursuant to four different theories of liability: three state law theories and one federal. The complaints contained counts for breach of contract, negligence, and entire want of care (or intentional tort). In the federal count, the complaint sought recovery pursuant to Article 17 of the Warsaw Convention. The complaints did not allege that any plaintiff sustained any physical or bodily injury or impact. Under Florida law, recovery for emotional distress caused by simple negligence requires allegations of discernible and demonstrable physical injury. *Brown v. Cadillac Motor Car Division*, 468 So.2d 903 (Fla. 1985). Recovery for intentional infliction of emotional distress is precluded unless the conduct is found to be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency. . . ." *Metropolitan Life Insurance Company v. McCarson*, 467 So.2d 277 (Fla. 1985); *Eastern Airlines, Inc. v. King*, at App. D. Therefore, Eastern moved for judgment on the pleadings based upon Floyd's failure to state a claim for which relief could be granted.[6]

The district court held that the allegations in the complaint failed to establish any intentional or willful misconduct on the part of Eastern in connection with its maintenance of the aircraft. Therefore, because recovery for mental distress pursuant to the breach of contract count and one of the two tort counts was dependent upon a finding of willful misconduct, the district court held that Floyd failed to state a cause of action. (App. B-2-13). As to the Warsaw Convention count, the district court, relying on *Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152 (D. N.M. 1973), concluded that "mental anguish alone is not compensable under the Warsaw Convention." (App. B-13).[7]

[6]Generally, the cause of action for mental distress contains certain safeguards, generally requiring, *inter alia*, a showing of physical injury, physical manifestation of psychic injury or some extreme or outrageous misconduct. Prosser & Keeton, *The Law of Torts*, 60-65, 359-361 (W. Keeton 5th ed. 1984).

The Eleventh Circuit reversed. As to the state law counts, the court held that it was bound by the decision of a Florida appellate court in a companion case holding that the allegations against Eastern stated a cause of action under Florida law for intentional infliction of emotional distress.[8] As to the Warsaw Convention count, it expressly rejected the analysis and conclusions of the New York Court of Appeals in *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 358 N.Y.S.2d 97, 314 N.E.2d 848 (N.Y. 1974) and the District of New Mexico in *Burnett v. Trans World Airlines, Inc.*, *supra*. It held that the "Convention provides recovery for purely emotional injuries unaccompanied by physical injury." (App. A-14). The court also held that a passenger could recover compensatory damages from an air carrier for pure emotional injury *in excess* of the $75,000 liability limits if the carrier acts with willful misconduct.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve a direct conflict involving the interpretation of a federal treaty. The Eleventh Circuit Court of Appeals and the New York Court of Appeals and the highest courts of Florida and New York are in conflict over an important question affecting all international air transportation. The Eleventh Circuit has construed the fundamental liability provision of the Convention to include recovery for pure emotional injury

[7]Absent allegations of discernible and demonstrable physical injury, the plaintiffs did not state a cause of action for negligent infliction of emotional distress. (App. B-4-5). The plaintiffs did not appeal the dismissal of their Florida breach of contract and negligence claims. (App. A-3).

[8]That decision was subsequently reversed. The Florida Supreme Court held that Eastern's conduct herein does not rise to intentional or willful and wanton misconduct. (App. C-1-14).

unaccompanied by physical injury or physical manifestations of psychic injury. Because under the Warsaw Convention and the Montreal Agreement an air carrier is presumptively and strictly liable for its passenger's accidental in-flight injuries, the decision below imposes upon international air carriers potentially unlimited, strict liability for its passengers' purely subjective emotional injuries. The liberal construction of the Warsaw Convention adopted by the Eleventh Circuit makes air carriers the insurers of their passengers against any emotional trauma. This construction is not supported by the language of the Convention or the Montreal Agreement. It seriously undermines the purposes of uniformity and limitation of liability that the Convention was designed to achieve.

I.

THE PANEL OPINION BELOW IS ADMITTEDLY IN DIRECT CONFLICT WITH THE NEW YORK COURT OF APPEALS' DECISION IN *ROSMAN V. TRANS WORLD AIRLINES* ON THE PROPER CONSTRUCTION OF THE WARSAW CONVENTION'S LIABILITY PROVISION.

The decision below is squarely in conflict with the New York Court of Appeals in *Rosman v. Trans World Airlines, Inc., supra,* 34 N.Y.2d 385, 358 N.Y.S.2d 97, 314 N.E.2d 848 (N.Y. 1974). Both courts interpret the terms of Article 17 to the Warsaw Convention, but the decision of the Eleventh Circuit effectively concludes that *any* emotional trauma, without accompanying physical injury, is compensable.

The Eleventh Circuit based its analysis on what it perceived to be the French legal meaning of "lesion corporelle." While noting that the issue has "confounded courts and commentators for many years. . .," the court nonetheless concluded that the phrase "bodily injury" includes any "personal" injury suffered by a person,

including "emotional injury unaccompanied by physical trauma." (App. A-29).

The court stated:

> ". . . [T]he drafters did not intend to exclude any particular category, common law or civil law, of damages. If they had, it seems likely that they would have referred to the two basic types of damages in French law, *dommage materiel* (bodily injury) and *dommage moral* (mental injury), rather than using the term *lesion corporelle,* which does not readily evoke a sharp distinction of French law."

(App. A-16 n. 16).

In a leap of logic, then the court concluded that language which encompasses both mental *and* physical injury permits recovery for mental injury *absent* physical injury.

Additionally, the Eleventh Circuit court relied heavily on *Husserl v. Swiss Air Transport Co.,* 388 F.Supp. 1238 (S.D. N.Y. 1975), the leading case holding that a passenger may recover for mental injury alone under Article 17. However, *Husserl* was decided before *Benjamins v. British European Airways,* 572 F.2d 913 (2d Cir. 1978). *cert. denied,* 439 U.S. 1114 (1979), which held that the Warsaw Convention creates a cause of action. Prior to *Benjamins,* the Second Circuit had held that the Warsaw Convention did not create a cause of action but merely imposed limits on state law causes of action. *Husserl* held that "mental injury alone should be compensable [under the Warsaw Convention], if otherwise applicable substantive [state] law provides an appropriate cause of action." 388 F.Supp. at 1251. The Eleventh Circuit ignores the fact that *Husserl* was decided in the context of state law remedies containing such safeguards on the recovery for pure emotional injury as the showing of physical injury, physical manifestation of psychic

injury or extreme or outrageous misconduct by the tortfeasor. Prosser & Keeton, *The Law of Torts*, 60-65, 359-361 (W. Keeton 5th ed. 1984). By imposing the *Husserl* holding onto the Warsaw Convention's no-fault liability regime, the Eleventh Circuit court has created an anomalous cause of action imposing on international air carriers virtual strict and potentially unlimited liability for what is essentially a subjective injury.

Squarely in conflict with *Floyd* is *Rosman v. Trans World Airlines, Inc.*, which involved an action to recover for mental distress resulting from an airplane hijacking. The *Rosman* court limited the air carrier's liability to those "palpable, objective bodily injuries, including those caused by the psychic trauma of the hijacking, and for the damages flowing from those bodily injuries, but not for the trauma as such or for the nonbodily or behavioral manifestations of that trauma." 314 N.E.2d at 857. In construing the words "bodily injury," the *Rosman* court stated:

> We deal with the term as used in an international agreement written almost 50 years ago, *a term which even today would have little significance in the treaty as an adjective modifying "injury" except to import a distinction from "mental"*. In our view, therefore, the ordinary, natural meaning of "bodily injury" as used in article 17 connotes palpable, conspicuous physical injury, and excludes mental injury with no observable "bodily", as distinguished from "behavioral", manifestations.

314 N.E.2d at 855. (Emphasis supplied.)

The effect of interpreting "lesion corporelle" as including emotional trauma unaccompanied by physical manifestations results in an "abandonment" of "the ordinary and natural meaning of the language of Article 17". *Id.* at 855.

Moreover, the *Rosman* court emphasized that, under the Montreal Agreement, "participating air carriers agreed to accept liability imposed upon them by Article 17 without fault." 314 N.E.2d at 851. The court thus posited the relevant issue as whether "by virtue of [an air carrier's] *absolute liability* for death or wounding . . . or any other bodily injury" Article 17 permitted recovery for purely emotional injury. (Emphasis supplied.) The court analyzed the issue in the context of the strict liability regime imposed upon air carriers under the Warsaw Convention and the Montreal Agreement, and properly declined to create a cause of action divorced from the traditional limitations attendant to the recovery for pure mental distress.

II.

THE FEDERAL AND STATE COURTS ARE IN DISARRAY OVER THE INTERPRETATION OF ARTICLE 17.

In addition to the conflict between *Floyd* and *Rosman* on the proper interpretation of Article 17, there exists direct conflict on the issue presented herein between two state courts of last resort. The New York Court of Appeals' decision in *Rosman* is in direct conflict on the issue with the Florida Supreme Court's decision in *Eastern Airlines, Inc. v. King*, (App. C-1-14). In a case arising out of the same incident involved *sub judice*, the Florida Supreme Court, in a conclusory opinion, held that Article 17 permits recovery for pure emotional injury. (App. C-8). The highest courts of Florida and New York are, therefore, in disagreement over the proper interpretation of Article 17.

Nor is the issue settled by *Rosman* for the state courts of New York. In *Palagonia v. Trans World Airlines*, 110 Misc.2d 478, 442 N.Y.S.2d 670 (N.Y. Sup. Ct. 1978), a hijacking case, a New York trial court declined to follow the ruling *of its own highest court* on the interpretation of Article 17. The *Palagonia* court did not deem itself bound by

the *Rosman* decision because that court had not held an evidentiary hearing on the issue of the French legal meaning of "lesion corporelle." After hearing conflicting evidence from experts, the court concluded that "'lesion corporelle' includes the concept of mental injury as a recoverable damage, even in the absence of a concomitant physical manifestation." *Id.* at 671.

Similarly, the federal district courts are in conflict over the issue and they offer a variety of rationales for their different conclusions. For example, the district court in *Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152 (D. N.M. 1973), like the state court in *Palagonia*, conducted an evidentiary hearing on the French legal meaning of the words "lesion corporelle." The court in *Burnett*, however, reached a result contrary to the *Palagonia* court, concluding that mental anguish alone was *not* encompassed within the French legal meaning of "lesion corporelle." 368 F.Supp. at 1156.

In conflict with *Burnett* are three decisions of the District Court for the Southern District of New York and one decision of the Central District of California. *Borham v. Pan American World Airways, Inc.*, No. 85 Civ. 6922 (CBM) (S.D. N.Y. 1986) (available in 19 Avi. Cas. 18,237 and on 1986 Westlaw 2974); *Karfunkel v. Compagnie Nationale Air France*, 427 F.Supp. 971 (S.D. N.Y. 1977); *Krystal v. British Overseas Airways Corporation*, 403 F.Supp. 1322 (C.D. Cal. 1975); *Husserl v. Swiss Air Transport*, 388 F.Supp. 1238 (S.D. N.Y. 1975). The *Husserl* court based its expansive reading of "lesion corporelle" on its conclusion that the Warsaw Convention did not preclude resort to state law remedies for types of damages not expressly enumerated in Convention. Therefore, a broad and inclusive reading of the types of injuries subject to the Convention's liability limitations, precluded resort to state law remedies and promoted the Convention's goals of uniformity and liability limitation.

Acting out of a similar concern, the court in *Karfunkel* followed *Husserl*, and concluded that:

> The goal of the Warsaw Convention was to create uniformity in actions for damages arising from international air accidents. Though there is an indicated difference of opinion on the question, it seems that better view that all claims for damages for personal injuries suffered by a passenger in an "accident", whether physical or mental, be resolved in one action under the Convention.

427 F.Supp. at 976-77.

The court in *Krystal* also followed *Husserl* but added an additional basis for its conclusion. In *Krystal*, the district court examined the actual Notice of the Convention's limitation required to be given passengers under the Montreal Agreement. The court found that the Notice included the wording "personal injury" instead of "bodily injury" and concluded that this clarified the intended meaning of the phrase in Article 17 to encompass recovery for purely emotional injury. 403 F.Supp. 1322.

Because of the complete disarray of the state and federal courts in resolving this fundamental issue involving a treaty, this Court should review the decision of the Eleventh Circuit Court of Appeals so that a uniform and consistent standard will be available to guide future courts and litigants.

III.

THE DECISION BELOW RAISES AN IMPORTANT QUESTION BECAUSE IT BROADLY CONSTRUES A TREATY PROVISION AND FUNDAMENTALLY INCREASES THE LIABILITY OF ALL INTERNATIONAL AIR CARRIERS SERVING THE UNITED STATES.

The decision below departs from this Court's rules for the proper construction of the Warsaw Convention. Recently, in *Chan v. Korean Air Lines, Ltd.*, ____ U.S. ____, 109 S.Ct. 1676, 1683-1684 n. 5, (1989), this Court held that the courts should be governed by the text of the Warsaw Convention, and that its most natural meaning controls unless contradicted by clear drafting history. In holding that "where the text [of the Warsaw Convention] is clear . . . we have no power to insert an amendment," this Court quoted Justice Story as follows:

> "[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops — whatever may be the imperfections or difficulties which it leaves behind." *The Amiable Isabella*, 6 Wheat 1, 71, 5 L.Ed 191 (1821).*

109 S.Ct. at 1683-1684.

*Also cited at 19 U.S. 1 (1821).

In a departure from this Court's rules for proper treaty construction, the Eleventh Circuit has ignored the clear and natural meaning of the phrase "bodily injury" and amended it to mean pure fright, mental distress or emotional injury absent bodily injury, impact or absent physical manifestations of injury. The Eleventh Circuit's holding is not supported by the "clear drafting history" of the Warsaw Convention. *See, e.g., Floyd,* (App. A-18) ("Unfortunately, the history of the drafting of the Warsaw Convention with respect to claims for mental injury is not helpful."). Instead, it relies upon cases containing the conflicting conclusions of experts who are in admitted disagreement on the proper construction of the words "bodily injury." *See: Palagonia v. Trans World Airlines, Inc.*, 110 Misc.2d 478, 442 N.Y.S.2d 670, 675 (N.Y. Sup. Ct. 1978) (noting scholarly disagreement over French legal meaning of "bodily injury"); *Husserl v. Swiss Air Transport Co.*, 388 F.Supp. 1238, 1250 (S.D. N.Y. 1975) (conflicting interpretations of the term "bodily injury" were unconvincing and inconclusive).

If allowed to stand, the decision below will have a substantial impact on all of international aviation. The purpose of the Convention "is uniformity among its diverse adherent Nations — the achievement, so far as possible, of a uniform body of law as to the various subject matters which are covered. The particular provisions limiting liability were designed to assure that only a regulated burden be borne by the air carriers." *Rosman, supra,* 358 N.Y.S.2d at 106, 314 N.E.2d at 854. The decision below undermines the Convention's purpose by imposing an absolute and potentially unlimited liability upon international air carriers for what is essentially a purely subjective and undemonstrable injury. It has been noted that "[m]ental disturbance is easily simulated, and courts which are plagued with fraudulent personal injury claims may well be unwilling to open the door to an even more dubious field." Prosser & Keeton, *The Law of Torts, supra,* at page 361. Nonetheless, the decision below imposes upon air carriers

absolute liability for fright, shock or other mental disturbances which are not marked by any definite physical symptoms capable of clear medical proof. It imposes such liability in a context which does not require a showing of fault or degree of misconduct. And it imposes such liability in absence of the traditional safeguards which separate the spurious from the meritorious claims. Conceivably, every hypersensitive individual with a fear of flying could make a claim against an airline for the discomfort experienced on a flight beset by turbulence. Historically, the law has been reluctant to redress fright or shock:

> The temporary emotion of fright, so far from serious that it does no physical harm, is so evanescent a thing, so easily counterfeited, and usually so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence, where the elements of extreme outrage and moral blame which have had such weight in the case of the intentional tort context are lacking.

Prosser & Keeton, *The Law of Torts, supra,* at page 361.

The Eleventh Circuit has created a cause of action which opens wide the door to litigation, subjecting international air carriers to the flood of fictitious or frivolous claims.

IV.

THE COURT MAY DESIRE TO CONSIDER AN ADDITIONAL QUESTION CONCERNING WHETHER THE WARSAW CONVENTION IS THE EXCLUSIVE PASSENGER REMEDY FOR ACCIDENTAL INJURIES OCCURRING IN INTERNATIONAL AIR TRANSPORTATION.

If this Court grants certiorari to decide the Article 17 question, it may wish to address the related question, left

undecided in *Air France v. Saks,* 470 U.S. 392 (1985), of whether the Warsaw Convention provides the exclusive grounds for carrier liability to an airline passenger injured in an in-flight accident.

In *Benjamins v. British European Airways,* 572 F.2d 913, 919, the Second District held that the Warsaw Convention creates a cause of action and provides the "universal source of a right of action" for passengers injured in international air transportation. *See, e.g.: Johnson v. American Airlines, Inc.,* 834 F.2d 721, 723 (9th Cir. 1987) (suggesting exclusivity in stating that the Warsaw Convention "applies to *all* cases in which aircraft is hired to transport someone or something on an international route.") (Emphasis in original); *Boehringer-Mannheim Diagnostics v. Pan American World Airways,* 737 F.2d 456, 459 (5th Cir. 1984) (Warsaw Convention preempts the field for damaged cargo claims in international transportation).

Other courts have held that the Warsaw Convention is exclusive where it applies but suggest that it narrowly preempts only those state laws in conflict with it. *In Re Aircrash in Bali, Indonesia on April 22, 1974,* 684 F.2d 1301, 1307 (9th Cir. 1982) (Congress did not intend for the Convention to preempt the field but it preempts state law which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.").

There is, therefore, a direct conflict among the courts of appeal over whether the Warsaw Convention preempts the field and provides the exclusive source of air carrier liability for damages sustained in international air transportation. The question of the Warsaw Convention's exclusivity is intertwined with the question of whether Article 17 comprehends recovery for purely mental or emotional injury. Courts which have read Article 17 broadly have often done so out of a concern that damages not comprehended by the Convention may give rise to state created causes of action not subject to any of the Convention's conditions or limits.

See, e.g., Karfunkel v. Compagnie Nationale Air France, supra, 427 F.Supp. at 976-77; *Husserl v. Swiss Air Transport Company, Ltd., supra,* 388 F.Supp. at 1246. An expansive reading of the types of injury comprehended by Article 17 has been deemed to advance the Convention's purpose of limiting air carrier liability. *Husserl,* 388 F.Supp. at 1246-47. Thus, the courts have been forced into the broad interpretation of Article 17 out of a persistent concern that the Warsaw Convention would otherwise be wholly circumvented and undermined by resort to state law causes of actions. This Court can resolve this dilemma by holding that the Warsaw Convention constitutes the exclusive source of air carrier liability for loss or injury suffered in international transportation. The Court should address this issue to provide needed guidance in future cases.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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April 9, 1990

Appendix

INDEX TO APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5381

D.C. Docket No. 83-1949

ROSE MARIE FLOYD and TERRY FLOYD, her husband, CONNIE GALE and MICHAEL GALE, her husband, MICHAEL GALE and CONNIE GALE, his wife, GLORIA PATTERSON, EDMOND PATTERSON, THOMAS J. NOLAN, ROBERT SCHARHAG, EUGENE H. CHAMP, FREDERICK W. HOEHLER, IV, SALLY ANN COLLINS, MICHAEL R. DRAMIS, SANDY DIX and GARY DIX, her husband, DANA DIX, by and through her parents GARY DIX and SANDY DIX, as guardians and next friends, ALEXANDER DIX, by and through his parents GARY DIX and SANDY DIX, as guardians and next friends, GERRI ASH SELF, SUSAN ROONEY and WILLIAM ROONEY, her husband, JANET JACOBS and BRUCE JACOBS, her husband, ALEXANDER EMBRY, SALIM KHOURY and DEBORAH KHOURY, his wife, BRUCE JACOBS and JANET JACOBS, his wife, MYRIAM CARRASCO (f/k/a MYRIAM RILEY) TERRY FLOYD and ROSE MARIE FLOYD, GARY DIX and SANDY DIX, his wife, SALIM KHOURY and DEBORAH KHOURY, his wife, GREGORY MANTZ, by and through his parents, NETTA MANTZ and HAROLD D. MANTZ, as guardians and next friends NETTA MANTZ, HAROLD MANTZ, GREGORY D. MANTZ, by and through his father HAROLD D. MANTZ,

Plaintiffs-Appellants,

versus

EASTERN AIRLINES, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

(May 5, 1989)

Before JOHNSON and ANDERSON, Circuit Judges, and ATKINS*, Senior District Judge.

ANDERSON, Circuit Judge:

This case presents difficult questions of interpretation of the Warsaw Convention. It also presents a difficult question concerning a Florida state law cause of action for intentional infliction of emotional injury; however, this court is bound by the state court's resolution of this issue. The case also presents issues relating to preemption of the state law cause of action. Because we hold that the district court erred in its construction of the Warsaw Convention, we reverse its judgment and remand with instructions. In addition, we reverse the district court's refusal to grant leave to two plaintiffs to amend their complaints.

I. FACTS

Eastern Airlines flight 855 left Miami en route to Nassau, Bahamas on the morning of May 5, 1983. During the flight, one of the airplane's three engines lost oil pressure. The crew shut down the ailing engine and headed back to Miami. Shortly thereafter, the second and third engines failed. Without power, the plane began losing altitude, and the crew told the passengers that they would have to ditch the plane in the Atlantic Ocean. Fortunately, the crew managed to restart the engine that had initially failed and to land the plane safely at Miami International Airport.

The plaintiffs in the twenty-five consolidated cases before us today were passengers on flight 855. Except for two cases discussed below, they have brought suit claiming

*Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

damages solely for mental distress arising out of this incident. These claims are grounded on two theories.[1] The first is a cause of action for intentional infliction of emotional distress under Florida law.[2] The second arises under the Warsaw Convention.[3] The United States District Court for the Southern District of Florida granted judgment on the pleadings in favor of Eastern, holding that the plaintiffs failed to state a claim upon which relief could be granted under either Florida or federal law. *In re Eastern Airlines, Inc., Engine Failure, Miami International Airport on May 5, 1983*, 629 F.Supp. 307 (S.D.Fla. 1986). In considering plaintiffs' appeal, then, we look only to the face of the complaint and must accept its allegations as true.[4]

We address in turn plaintiffs' state law claim for intentional infliction of emotinoal distress (Part II), the cause of action under the Warsaw Convention for emotional injury (Part III), preemption (Part IV), plaintiffs' claim for punitive damages pursuant to Article 25 of the Warsaw Convention (Part V.A.), preemption of plaintiffs' state law

[1]The plaintiffs also brought breach of contract and negligence claims under Florida law, but they did not appeal the district court's dismissal of those claims.

[2]The parties agree, and the district court held, that Florida law governs plaintiffs' claim for intentional infliction of emotional distress. *In re Eastern Airlines, Inc., Engine Failure, Miami International Airport on May 5, 1983*, 629 F.Supp. 307, 309 n.1 (S.D.Fla. 1986).

[3]Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, adhered to by the United States June 27, 1934, 49 Stat. 3000, 3014, reprinted in 49 U.S.C. note following § 1502. We shall refer to this treaty by its more popular and less cumbersome name, the Warsaw Convention.

[4]The plaintiffs have represented to this court that their complaints are identical in all respects material to this appeal. Since Eastern has not challenged this representation, we accept it as true. We work from the complaint in the Floyd case, and any references to "the complaint" are to that one, except in Part VII, *infra*.

claim for punitive damages (Part V.B.), guidance on remand with respect to willful misconduct under the Warsaw Convention (Part VI), and denial of leave to amend the complaints of two plaintiffs (Part VII).

II. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM

Plaintiffs alleged that Eastern's maintenance personnel responsible for Flight 855 had failed to install the required oil seals or "O-rings" necessary to prevent oil leaks; that Eastern's records revealed that its aircraft had experienced a dozen prior engine failures stemming from the absence of O-rings; and that Eastern knowingly failed to institute appropriate procedures to correct the problem. The plaintiffs sought damages for intentional infliction of emotional distress based upon these allegations under Florida law.

In a case arising out of the same incident as the cases before us today, the Florida Third District Court of Appeal sitting *en banc* held that plaintiffs' allegations stated a cause of action under Florida law. *King v. Eastern Airlines, Inc.*, 536 So.2d 1023 (Fla. 3d D.C.A. 1987).[4] This court is bound by that interpretation of Florida law in the absence of some persuasive indication that the Florida Supreme Court would hold otherwise. *Bradbury v. Wainwright*, 718 F.2d 1538, 1540 (11th Cir. 1983); *Silverberg v. Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678, 690 (11th Cir. 1983). We note that on March 9, 1989, the Supreme Court of Florida accepted jurisdiction in the *King* case.[5] For purposes of this

[4]The Florida court also held that plaintiffs' claims did not state a cause of action under federal law, the Warsaw Convention. 532 So.2d at 1074-76. The parties concede that this Court is not bound by that aspect of the Florida court's holding.

[5]The Court has set oral argument in *King* for June 8, 1989. *King v. Eastern Airlines, Inc.*, Order Accepting Jurisdiction and Setting Oral Argument, Case No. 73,395 (Fla. Mar. 9, 1989).

opinion only, we assume that the law of Florida is as enunciated by the Third District Court of Appeals. However, on remand the district court will be bound by the decision of the Supreme Court of Florida on the issue of the state law cause of action for intentional infliction of emotional distress.

III. WARSAW CONVENTION CLAIM

In their amended complaints, plaintiffs assert a claim for damages under the Warsaw Convention. The Convention is an international treaty to which the United States is a party. *Air France v. Saks*, 470 U.S. 392, ____, 105 S.Ct. 1338, 1341 (1985). Most of the major countries of the world adhere to the Warsaw Convention, including the Bahamas, the intended destination of Flight 855. *See* Lee S. Kreindler, 1 *Aviation Accident Law* § 11.01[3] at 11-7 (1988) (listing countries which are parties to the Convention). The Convention applies to "all international transportation of persons, baggage, or goods performed by aircraft for hire." Warsaw Convention Art. 1.

The Warsaw Convention was the result of two international conferences, held in Paris in 1925 and Warsaw in 1929, and of the work done in the interim by the Comité International Technique d'Experts Juridiques Aériens ("CITEJA"). *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 326-27 (5th Cir. 1967) (discussing background of Warsaw Convention), *cert. denied*, 392 U.S. 905 (1968). At that time, commercial air travel was in its infancy, but "[c]ommon rules to regulate international air carriage ha[d] become a necessity." *Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw* 13 (English translation by Robert C. Horner and Didier Legrez 1975) ("*Minutes*") (address of Mr. Lutostanski, head of the Polish delegation).

The conference at Warsaw had two goals. First, to establish uniformity as to documentation such as tickets and

waybills, and procedures for dealing with claims arising out of international transportation. *See Minutes* at 85, 87. The second, and more important at the time, goal of the conference was to limit the potential liability of air carriers in the event of accidents and lost or damaged cargo. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, ____, 104 S.Ct. 1776, 1784 (1984); *Minutes* at 37; Andreas F. Lowenfeld and Allan I. Mendelsohn, *The United States and The Warsaw Convention*, 80 Harv.L.Rev. 497, 498-99 (1967) ("Lowenfeld and Mendelsohn"). The Convention established a presumption that air carriers are liable for damage sustained by passengers as a result of the carrier's negligent conduct, but strictly limited this liability to 125,000 Poincaré francs, approximately 8,300 dollars. Warsaw Convention Art. 17, 20, 22.

Proponents put forth several reasons in support of the strict limitations on air carrier liability. First, they pointed out that such limits on liability were not unknown in the law, and drew an analogy to maritime law with its global limitation of a shipowner's liability which enables it to obtain necessary capital. In addition, a limitation on liability provided necessary protection of a financially weak industry and ensured that catastrophical risks would not be borne by the air carriers alone. Furthermore, the limit allowed for the inability of carriers to insure against such great risks while admitting that passengers could obtain insurance themselves. Finally, the liability limitation sought to avoid litigation by facilitating quick settlements and establishing a uniform law with respect to the amount of recoverable damages. *See* H. Drion, *Limitation of Liabilities in International Air Law* 12-44 (1954). Whatever the validity of these arguments today,[7] the liability limitation was and remains an integral feature of the Warsaw scheme.

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[7]*See* Kreindler, 1 *Aviation Accident Law* §11.01[6] at 11-13; Comment, *Warsaw Convention Liability Limitations: Constitutional*

(Footnote continued on next page)

While the air carriers clearly were the chief beneficiaries of the Warsaw system, passengers also received some benefits. Article 23 of the Convention invalidated any attempt by the carrier tending to relieve it of liability or to fix a limit lower than that of the Convention. The Convention also shifted the burden of proof in an accident so that the carrier was presumed negligent unless it could show that it had taken all necessary measures to avoid damages or that it was impossible for it to take such measures. Warsaw Convention Art. 20. In addition, Article 25 provided that the carrier would not be able to invoke the liability limitation in cases where a plaintiff is able to prove "willful misconduct." Respected commentators have noted that "[t]he essential bargain was a shift in the burden of proof in return for a limit of liability (except in cases of willful misconduct) set at 8,300 dollars per person." Lowenfeld and Mendelsohn, 80 Harv.L.Rev. at 500; *Minutes* at 47, 51.[8]

The United States did not participate in the drafting of the Convention; it had only sent observers to Warsaw. *Minutes* at 10. After serveral countries ratified the Convention, however, the United States pronounced its adherence to the Warsaw Convention in 1934. On June 15, 1934, the Senate approved the Convention by voice vote. 78 Cong.Rec. 11,582 (1934); *see* Lowenfeld and Mendelsohn, 80 Harv.L.Rev. at 502.

The Convention provoked sharp debate and criticism in the United States and throughout the world almost immediately after it went into effect, and many proposals to revise it were put forth. *See* Lowenfeld and Mendelsohn, 80

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Issues, 6 Nw.J.Int'l L. & Bus. 896 (1984); Comment, *The Growth of American Judicial Hostility Towards the Liability Limitations of the Warsaw Convention*, 48 J. Air L. & Com. 805 (1983).

[8]In 1966, air carriers serving the United States agreed to waive their due care defenses and increase the amount of their liability to $75,000 in the Montreal Agreement, which we discuss *infra*.

Harv.L.Rev at 502; Stuart M. Speiser and Charles F. Krause, 1 *Aviation Tort Law* § 11.17 at 669-70 (1978 and 1988 Supp.) ("Speiser and Krause"). The parties to Warsaw met at the Hague in 1955 to consider revising the Convention. The principal effect of the Hague Protocol was to double the liability limit to approximately $16,600. Hague Protocol Art. XI, *reprinted in* Andreas F. Lowenfeld, *Aviation Law Documents Supp.* 958-59 (2d ed. 1981). Opponents expressed continuing dissatisfaction with the limit of liability even under Hague, and the United States has never adhered to the Hague Protocol. *See Reed v. Wiser*, 555 F.2d 1079, 1083-88 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977).

This dissatisfaction with the Warsaw regime led to the United States' formal denunciation of the Convention pursuant to Article 39 in November 1965. *See* 31 Fed.Reg. 7302 (1966). The notice of denunciation led to intense negotiations culminating in the Montreal Agreement[9] of 1966.[10] At Montreal the airlines entered into an "interim solution" (that has lasted over twenty years) whereby airlines agreed to raise the limit of liability to $75,000 and waive the due care defenses of Article 20 for flights originating, terminating, or having a stopping point in the United States. Lowenfeld and Mendelsohn, 80 Harv.L.Rev. at 602. The Montreal Agreement is not a treaty, but rather an agreement among all major international air carriers that imposes a quasi-legal and largely experimental system of liability essentially contractual in nature. *Krystal v. British Overseas Airways Corp.*, 403 F.Supp. 1322 (C.D.Cal. 1975).

[9]Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, approved by CAB Order No. E-28680, May 13, 1966, 31 Fed.Reg. 7302 (1966).

[10]For a detailed discussion of the events leading up to Montreal and the Montreal Agreement itself, see Lowenfeld and Mendelsohn, 80 Harv.L.Rev. 497. The authors represented the United States State Department at Montreal.

Other international conferences have taken place since Montreal in an attempt to revise the Warsaw regime, *see* Speiser and Krause § 11.20 at 680-83, Lowenfeld, *Aviation Law Documents Supp.* at 975-1022, but today the United States remains subject to the terms of the original Warsaw Convention, as modified by the Montreal Agreement. *See* Kreindler, 1 *Aviation Accident Law* § 11.01[7] at 11-16. It is ironic that the delegates at Warsaw in no way considered their work definitive. Mr. Amedeo Giannini, Head of the Italian Delegation at Warsaw, stated that what the delegates were doing was "nothing but a first try at codification, a first effort to codify aeronautical law." *Minutes* at 32.

The Warsaw Convention is a self-executing treaty which requires no implementing legislation by the signatories. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252, 104 S.Ct. 1776, 1783 (1984). Therefore, we must look to the terms of the Warsaw Convention itself to determine whether Eastern can be held liable to the plaintiffs in this case for their alleged emotional injuries.

A. *The Cause of Action Under Warsaw*

At the outset, we accept those cases holding that the Warsaw Convention itself creates a cause of action. In the years immediately following the United States' adherence to the Convention, most courts and commentators assumed that Article 17 created a cause of action. *See Salamon v. Koninklijke Luchtvaart Maatschappij, N.V.*, 107 N.Y.S.2d 768, 773 (Sup.Ct. 1951), *aff'd mem.* 281 App.Div. 965, 120 N.Y.S.2d 917 (1st Dept. 1953) ("[i]f the Convention did not create a cause of action in Art. 17, it is difficult to understand just what Art. 17 did do"); James M. Grippando, *Warsaw Convention—Federal Jurisdiction and Air Carrier Liability for Mental Injury: A Matter of Limits*, 19 Geo.Wash.J.Int'l L. & Econ. 59, 64-65 (1985); Lowenfeld and Mendelsohn, 80 Harv.L.Rev. at 517.

Two seminal Second Circuit decisions in the 1950's, however, held that the Warsaw Convention did not create a cause of action. *Komlos v. Compagnie Nationale Air France*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 820 (1954); *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957). Courts followed these decisions for two decades, and most commentators assumed the question to be closed, although not without criticizing the decisions. *See* Lowenfeld and Mendelsohn, 80 Harv.L.Rev. at 516-19; G. Nathan Calkins, Jr., *The Cause of Action Under the Warsaw Convention*, 26 J.Air L. & Com. 217, 323 (1959).

Upon reexamination of these decisions, a careful analysis of the minutes of the Convention, and an analysis of the goals of the Warsaw regime, however, the Second Circuit reversed itself in *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). Judge Lumbard, author of the of the *Noel* decision, wrote the opinion for the court holding that the Warsaw Convention itself did create a cause of action for wrongful death under Article 17 and for lost baggage under Article 18. Other courts of appeals soon followed. *See Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985); *Abramson v. Japan Airlines Co.*, 739 F.2d 130 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985); *In re Mexico City Air Crash of October 31, 1979*, 708 F.2d 400 (9th Cir. 1983). *See also* Note, *The Warsaw Convention—Does it Create a Cause of Action?*, 47 Fordham L.Rev. 366 (1978). While the Supreme Court has not expressly decided the issue, it implicitly has adopted the view that the Warsaw Convention itself creates a cause of action. In one of only three cases[11] construing the Warsaw Convention, the Court

[11]The other Supreme Court cases on the Warsaw Convention addressed the Convention's gold-based liability limits for lost cargo, *(Footnote continued on next page)*

held in *Air France v. Saks*, 470 U.S. 392, 105 S.Ct. 1338 (1985), that an airline passenger who became permanently deaf allegedly because of negligent maintenance and operation of the aircraft's pressurization system was not a victim of an "accident" for which the airline could be held liable under Article 17 of the Warsaw Convention. While Saks' original complaint stated a cause of action for negligence under state law, the Court ruled only on her allegations under Warsaw. 470 U.S. at ____, 105 S.Ct. at 1347.

In *St. Paul Insurance Co. v. Venezuelan International Airways, Inc.*, 807 F.2d 1543, 1546 (11th Cir. 1987), a panel of this court held that Articles 18, 21, and 28 of the Convention created a cause of action against international air carriers for lost cargo. We extend this holding to Article 17 of the Convention as well, and hold that Article 17 creates a cause of action for personal injury.

B. *Article 17*

Having concluded that the Warsaw Convention creates a cause of action, we now turn to the difficult question of interpreting the provisions of the Convention. Article 17 of the Convention sets forth the liability of international air carriers for injuries to passengers. Plaintiffs assert that Article 17 of the Convention provides a remedy for the injuries that they allegedly suffered—i.e., psychic injuries and emotional distress unaccompanied by physical injury.

In assessing the validity of their claim, we are required to determine the French legal meaning of the Convention's

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Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, ____, 104 S.Ct. 1776 (1984), and the question whether an airline may assert the $75,000 Convention limitation on liability if the limitation is printed on passenger tickets in smaller type size than that specified in the Convention. *Chan v. Korean Air Lines, Ltd.*, 490 U.S. ____, 57 U.S.L.W. 4432 (April 18, 1989).

terms.[12] *Air France v. Saks*, 470 U.S. 392, ____, 105 S.Ct. 1338, 1342 (1985); *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).[13] The French text of the Warsaw Convention is the only official text and the one officially adopted and ratified by the Senate. *See Minutes* at 15 (resolution designating French as official language of the conference). The unofficial United States translation, which appears at 49 Stat. 3014, was made by the State Department. *See Palagonia v. Trans World Airlines, Inc.*, 110 Misc.2d 478, 442 N.Y.S.2d 670, 672 (Sup.Ct. 1978). The Supreme Court stated that the French legal meaning controls

> not because "we are forever chained to French law" by the Convention, but because it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties. We look to French legal meaning for guidance as to these expectations because the Warsaw Convention was drafted in French by continental jurists.

Saks, 470 U.S. at ____, 105 S.Ct. at 1342 (citations omitted). *See also* Dana Stanculescu, *Recovery for Mental Harm Under Article 17 of the Warsaw Convention: An Interpretation of Lésion Corporelle*, 8 Hastings Int'l and Comp.L.Rev. 339, 347-350 (1985).

The original French text of Article 17 reads as follows:

> Le transporteur est responsable du dommage survenu en cas de mort, de blessure, ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aérnoef au cours de toutes opérations d'embarquement et de débarquement.

The unofficial United States translation of Article 17 is as follows:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3014, reprinted at note following 49 U.S.C. § 1502.

The incident here clearly occurred on board the aircraft. *Cf. Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); Note, *Warsaw Convention—Air Carrier Liability for Passenger Injuries Sustained Within a Terminal*, 45 Fordham L.Rev. 369 (1976). The district court held that the loss of power and preparation for ditching on Flight 855 was an "accident" for Article 17 purposes, and Eastern has not contested that ruling. 629 F.Supp. at 312; *see Saks*, 470 U.S. at ____, 105 S.Ct. at 1345 ("accident" defined as an "unexpected or unusual happening or event that is external to the passenger").

The crucial issue, then, is whether the phrase *lésion corporelle* encompasses purely emotional distress. The question whether Article 17 encompasses recovery for purely mental injuries has confounded courts and commentators for many years. An early commentary on the Warsaw Convention pointed out that Article 17 "is full of pitfalls and obscurities," and noted that "it is not clear if mental injury

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[12]The French legal meaning of the Warsaw Convention is properly before us today. The district court discussed the issue, 629 F.Supp. at 312-14, and all parties clearly were on notice that this question of French law was relevant to the case. The briefs on appeal also addressed the issue. *See* Fed.R.Civ.P. 44.1; Charles Alan Wright and Arthur R. Miller, 9 *Federal Practice & Procedure* §2443 at 403 (1971 and 1988 Supp.).

[13]This case was decided prior to the close of business on September 30, 1981, and is binding precedent under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

is covered by the Article." K.M. Beaumont, *Need for Revision and Amplification of the Warsaw Convention*, 16 J.Air L. & Com. 395, 401-02 (1949).

Based upon our interpretation of the French legal meaning of the text, the concurrent and subsequent legislative history, and the case law, we conclude that the Convention provides recovery for purely emotional injuries unaccompanied by physical injury.

1. French legal meaning of the text

Because the Warsaw Convention was drafted in French and reflects a civil law liability regime, we must look to the French legal meaning of *lésion corporelle* to determine whether it contemplates recovery for mental anguish unaccompanied by physical trauma. After careful review of the cases and commentary on the meaning of *lésion corporelle*, we are persuaded that the term covers any "personal" injury — i.e., any injury suffered by the plaintiff as a person. *See Palagonia v. Trans World Airlines, Inc.*, 110 Misc.2d 478, 442 N.Y.S.2d 670, 673 (Sup.Ct. 1978); Rene H. Mankiewicz, *The Liability Regime of the International Air Carrier* 145-46 (1981) ("Mankiewicz").[4] This includes emotional injury unaccompanied by any physical trauma.

While the use of the word *corporelle* would, if read literally, appear to imply that recovery for *dommage mentale* is unavailable, we are persuaded that this literal reading is unwarranted. *Cf. Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152, 1156 (D.N.M. 1973) (applying literal French translation of *lésion corporelle* to exclude recovery for mental anguish). The literal translation of *lésion corporelle* does not fully capture its French legal meaning. *Palagonia*, 442 N.Y.S.2d at 673. *See* Mankiewicz at 141 (1981) ("While 'bodily injury' is undoubtedly a grammatically correct translation of *lésion corporelle*, it may

[4]Dr. Mankiewicz is an internationally known expert on the Warsaw Convention and aviation law. *See Palagonia*, 442 N.Y.S.2d at 672.

rightly be argued that the meaning of that expression in French law and its equivalents in other civil laws are more correctly rendered by the expression 'personal injury'."). Our study of the issue has convinced us that there is nothing in French law prohibiting compensation for any particular kind of damage, including emotional trauma, provided the damage is certain and direct. *See* Barry Nicholas, *French Law of Contract* 219-26 (1982); Marcel Plainol and George Ripert, 2 *Treatise on the Civil Law* No. 249 at 150-51 (11th ed. 1959) (Louisiana State Law Institute translation).

Nor can it be said that the express mention of the word *corporelle* by implication excludes what is *mentale*. One commentator points out that *dommage corporelle* in French law includes physical, mental, and moral damage, as well as any pecuniary loss resulting from personal injury. Georgette Miller, *Liability in International Air Transport* 122-23 (1977) ("Miller").

There is no counterpart in French law to the common law doctrine which distinguishes between physical injury (compensable), and purely mental or emotional injury unaccompanied by physical injury (not compensable). To the contrary, French law permits recovery for any damage whether material or moral. *Palagonia*, 442 N.Y.S.2d at 673; Mankiewicz at 145, 157; Miller at 112-15. This includes damages such as medical expenses, funeral expenses, lost earnings, and pain and suffering. Mankiewicz at 157. It also includes recovery for mental suffering unaccompanied by physical injury. Mankiewicz at 145. *See also* Yvonne Blanc-Dannery, *La Convention de Varsovie et les règles du transport aérien international* 62 (Paris 1933), *quoted in* Mankiewicz at 146 ("[t]he use of the expression *lésion* after the words 'death' and 'wounding' encompasses and contemplates cases of traumatism and nervous troubles, the consequences of which do not immediately become manifest

in the organism but which can be related to the accident.").[15] *See also Palagonia*, 442 N.Y.S.2d at 673 (relying on Blanc-Dannery dissertation).[16]

The wording of Article 17 strongly suggests that the drafters did not intend to exclude any particular category of damages. If *lésion corporelle* was intended to refer only to injury caused by physical impact, it is likely that the civil law experts who drafted the Warsaw Convention in 1929 would not have singled out and specifically referred to a particular case of physical impact such as *blessure* ("wounding").[17] *See* Mankiewicz at 146.

The terms of the Convention must be construed broadly in order to advance its goals. *See Stratis v. Eastern Air Lines, Inc.*, 682 F.2d 406, 412 (2d Cir. 1982); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975) ("a relatively broad construction of Article 17 is in harmony with modern theories"), *cert. denied*, 429 U.S. 890 (1976); *Preston v. Hunting Air Transport, Ltd.*, 1 Q.B. 454, 1 All Eng.Rep. 443, 1 Lloyd's Rep. 45 (1956) (Article 17 read to encompass not merely financial loss, but also loss suffered by children after their mother killed in air crash). One clear goal of the Convention is to maintain uniformity. *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968). It would clearly contravene this goal of uniformity for courts of the United States to import into Warsaw Convention jurisprudence the common law doctrine espoused by Eastern when that doctrine has no foundation in French law.

2. Concurrent and subsequent legislative history of the Warsaw Convention and conduct of the parties

While analysis of any treaty or international agreement must begin with the text of the document and the context in which the written words are used, *see Maximov v. United States*, 373 U.S. 49, 53-54, 83 S.Ct. 1054, 1057-58 (1963), it is proper to refer also to records of its drafting and negotiation when interpreting a treaty when the text is subject to

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[15]The Blanc-Dannery thesis was written under the supervision of Dean Georges Ripert, a leading French delegate at Warsaw. *Minutes* at 6 (listing French delegation). The Second Circuit has referred to Ripert as the "dean of French writers on civil law." *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976). *See also Block v. Compagnie Nationale Air France*, 386 F.2d 323, 328 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

[16]While French law does not draw the sharp distinction that the common law does between emotional injuries and injuries resulting from physical trauma, it does recognize two types of legally cognizable injuries: physical injuries *(dommage materiel)* and non-physical injuries *(dommage moral)*. Miller at 125. *Dommage materiel* consists of pecuniary loss resulting from injury, such as compensation for expenses or financial loss resulting from injury or death, medical and funeral expenses, and loss of earning power or income. *Dommage moral* refers to intangible losses such as pain and suffering, invasion of privacy, or disfiguration. Mankiewicz at 157. *See also* Simeon Moquet Borde & Associes, 1 Doing Business in France § 8.02[2][b] at 8-6 (1988) (physical injuries are those which are caused to the person or property of the injured person; non-physical injuries include the pain and suffering of the injured party himself, the injury caused to the honor or emotions of the injured party (e.g. slander or the mental suffering resulting from the death of a spouse) or the loss of consortium). An accident victim generally can claim recovery for both *dommage materiel* and *dommage moral* under French law, as long as the victim can prove that the accident was the direct cause of his or her injuries. Mankiewicz at 157; Marcel Plainol and George Ripert, 2 *Treatise on the Civil Law* No. 867-868A at 470-73 (11th ed. 1959) (Louisiana State Law Institute translation). Bodily injuries, as well as mental injuries, can be compensated as *dommage moral* without any other distinction as to the origin of the injury. Miller at 126. As we have discussed, the wording of Article 17 strongly suggests that the drafters did not intend to exclude any particular category, common law or civil law, of damages. If they had, it seems likely that they would have referred to the two basic types of damages in French law, *dommage materiel* and *dommage moral*, rather than using the term *lesion corporelle*, which does not readily evoke a sharp distinction of French law. Miller at 125.

[17]*But see Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152, 1156 (D.N.M. 1973) (court rejected the argument that the term *blessure* itself as used in Article 17 encompassed emotional injury). *See Husserl v. Swiss Air Transport Co.*, 351 F.Supp. 702, 708 (S.D.N.Y. 1972) ("*Husserl I*"), *aff'd* 485 F.2d 1240 (2d Cir. 1973).

conflicting interpretations. *Saks*, 470 U.S. at ____, 105 S.Ct. at 1343. "[T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32, 63 S.Ct. 672, 677-78 (1943). *See Cook v. United States*, 288 U.S. 102, 53 S.Ct. 305, 308 (1933). As Judge Wisdom stated in *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968), "the determination in an American court of the meaning of an international convention drawn by continental jurists is hardly possible without considering the conception, parturition, and growth of the convention."

Unfortunately, the history of the drafting of the Warsaw Convention with respect to claims for mental injury is not helpful. *See Husserl v. Swiss Air Transport Co.*, 388 F.Supp. 1238, 1249 (S.D.N.Y. 1975) ("Husserl II"); *Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152, 1156-57 (D.N.M. 1973); *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 358 N.Y.S.2d 97, 105 (1974); Grippando, 19 Geo.Wash.J.Int'l L. & Econ. at 84-85. The drafters of the Convention in 1929 did not discuss whether Article 17 encompassed recovery for mental injuries. *See generally Minutes*. The Senate did not address the issue when it adhered to the Convention in 1934. *See* 78 Cong.Rec. 11,577-82 (1934).

Subsequent action by the contracting countries to the Warsaw Convention, however, supports the conclusion that Article 17 encompasses recovery for mental anguish. When interpreting a treaty, reference to the subsequent interpretations by its signatories is appropriate to help determine the meaning of an ambiguous provision. *Air France v. Saks*, 470 U.S. at ____, 105 S.Ct. at 1344. The conduct of the parties of a treaty is relevant in ascertaining the proper construction to accord the treaty's provisions. *Id.*; *Pigeon River Improvement Slide & Boom Co. v. Charles W.*

Cox, Ltd., 291 U.S. 138, 158-63, 54 S.Ct. 361, 366-67 (1934); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35-36 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

Actions by the contracting states suggest that the translation of *lésion corporelle* as "bodily injury" may have placed too narrow a meaning on the French term. For example, one commentator has pointed out that the official German translation of Article 17 rendered the term *lésion corporelle* as "any infringement on the health . . . ." This translation may more correctly reflect the understanding of the expression *lésion corporelle* by the delegates at Warsaw. Mankiewicz at 146.

The signatory airlines at Montreal in 1966 did not discuss whether Article 17 provided recovery for mental injury. Andreas F. Lowenfeld, *Hijacking, Warsaw, and the Problem of Psychic Trauma*, 1 Int'l L.J. of Syracuse 345, 347-48 (1973). The focus concerned raising the limit of liability to $75,000 and the carriers' agreement to waive their due care defense. However, the Montreal Agreement used language which is relevant. In paragraph 1 of the Agreement, the airlines agreed to include certain language in their conditions of carriage — "[t]he limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of $75,000." In paragraph 2, the airlines agreed to include certain language on each ticket as a notice to passengers — "the liability of . . . [name of carrier] . . . for death or personal injury to passengers is limited in most cases to proven damages not to exceed $75,000 per passenger." The Civil Aeronautics Board Order which approved the terms of the Montreal Agreement also uses the term "personal injury" interchangeably with the term "bodily injury" when referring to compensable injuries under the Warsaw regime.[18] 31 Fed.Reg. 7302 (1966). The

[18]The CAB order uses the phrase "death, wounding, or other bodily injury" three times. The phrase "personal injury" is repeated four times. 31 Fed.Reg. 7302 (1966).

actual notice issued by the airlines to passengers uses the term "personal injury." *See Krystal v. British Overseas Airways Corp.*, 403 F.Supp. 1322, 1323 (C.D.Cal. 1975). The court in *Krystal* found this to be dispositive on the question whether Article 17 encompassed claims for purely psychic injury. On the other hand, a participant at the Montreal conference has asserted that "no legal significance should be attached to this change in wording, which was occasioned solely by the need to draft an intelligible notice in readable type in the space provided by a ticket booklet." Lowenfeld, 1 Int'l L.J. of Syracuse at 347 n.7.

While we do not find the change in wording on the ticket form or the interchangeable uses of "bodily injury" and "personal injury" to be dispositive, neither do we completely discount them. It seems clear to us that there is significance in the fact that the Montreal Agreement itself and the Civil Aeronautics Board Order use the two terms interchangeably. It is also significant that the only document which is actually delivered to passengers informs them that the airline's liability is limited in cases of death or "personal injury," not merely "bodily injury." This is evidence of "the conduct of the parties to the Convention and the subsequent interpretations of the signatories" which, according to the Supreme Court in *Saks*, 470 U.S. at ____, 105 S.Ct. at 1344, helps clarify the meaning of the terms. *See also Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975) (construing Warsaw Convention in light of Montreal Agreement), *cert. denied*, 429 U.S. 890 (1976); *Board of County Commissioners of Dade County, Florida v. Aerolineas Peruanasa, S.A.*, 307 F.2d 802, 806-07 (5th Cir. 1962) (must consider intent of the parties in construing treaty such as the Warsaw Convention), *cert. denied*, 371 U.S. 961 (1963); *St. Paul Insurance Co. v. Venezuelan International Airways, Inc.*, 807 F.2d 1543, 1546 (11th Cir. 1987). Thus, we consider this evidence as another factor in favor of allowing recovery for mental injuries.

In addition, the authentic English text of Article 3(1)(c) of the Convention, as amended at The Hague, used the expression "personal injury," while the authentic French text of the amended article retained the expression "*lésion corporelle*." Hague Protocol Art. III, reprinted in Lowenfeld, *Aviation Law Documents Supp.* at 956. *See* Mankiewicz at 141, 178.

Another important piece of subsequent "legislative history" is the Guatemala City Protocol. *Air France v. Saks*, 470 U.S. at ____, 105 S.Ct. at 1344-45 (using Guatemala City Protocol to interpret meaning of "accident" in Article 17); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976). The Protocol was drafted in three authentic texts, English, French, and Spanish, although in cases of conflict the French text is to be controlling. Guatemala City Protocol Art. XXVI, *reprinted in* Lowenfeld, *Aviation Law Documents Supp.* at 984. The English text of the Protocol has substituted "personal injury" for "wounding or other bodily injury" in the translation of Article 17. The French text has retained the expression *lésion corporelle*. The fact that an official English translation of Article 17 made by the drafters at the Hague differs from the unofficial American translation made by the State Department casts doubt on the accuracy of the unofficial American translation. *See* Miller at 123.

The United States Senate has not ratified the Guatemala City Protocol,[9] so it is important not to

[9]The Guatemala City Protocol was drafted in such a way as to prohibit its ratification without the United States' assent, in order to avoid a repetition of the Hague Protocol situation. *See* Mankiewicz at 9-10. The fact that the Senate has not ratified these modifications of the Warsaw system is attributable to a reluctance to accept any damage limitations at all, not from a desire to limit recoverable damages to purely physical injury. *See* 129 Cong.Rec. S2237, S2270-79 (Daily ed. March 8, 1983); *In re Korean Air Lines Disaster of September 1, 1983*, 664 F.Supp. 1463, 1469-70 (D.D.C. 1985), *aff'd*, 829 F.2d 1171 (D.C. Cir. 1987), *aff'd*

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overestimate its importance. Grippando, 19 Geo.Wash.J.Int'l L. & Econ. at 85 n. 158; Speiser and Krause § 11.20 at 680-83. Nor has the Senate ratified the Hague Protocol or Montreal Protocols 3 and 4,[20] which also would have adopted the change in wording of the English translation of Article 17 from "wounding . . . or any other bodily injury" to "personal injury." While these Protocols "do not govern the disposition of this case" because of the lack of Senate ratification, nevertheless they are evidence of "the conduct of the parties and the subsequent interpretations of the signatories." *Saks*, 470 U.S. at ____, 105 S.Ct. at 1344. This evidence provides additional support for the conclusion that the French legal meaning of *de mort, de blessure, on de toute autre lésion corporelle* is "death or personal injury" rather than "bodily injury."

3. Cases interpreting Article 17

Prior judicial construction of Article 17, while helpful, often has been flawed. In the 1970's an explosion of terrorist activities led to litigation over the type of injuries compensable under Article 17. Hijackers often did not

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sub nom. Chan v. Korean Air Lines, Ltd., 490 U.S. ____, 57 U.S.L.W. 4432 (April 18, 1989); Lee S. Kreindler, *A Plaintiff's View of Montreal*, 33 J.Air L. & Com. 528, 528-29 (1967); Grippando, 19 Geo.Wash.J.Int'l L. & Econ. at 85-86 n.158. *See also Reed v. Wiser*, 555 F.2d 1079, 1087 (2d Cir.) (discussing Hague Protocol, court stated that "the only reason for the United States' refusal to ratify it was its dissatisfaction with the low level of the carriers' liability limitations, not the other provisions of the Protocol."), *cert. denied*, 434 U.S. 922 (1977).

[20]Drafted in 1975, Montreal Protocols 3 and 4 were intended to amend the Warsaw Convention as amended by the Hague and Guatemala City Protocols. Montreal Protocol No. 3 replaced the Poincare franc, in which limits of liability had been expressed, with the Special Drawing Right of the International Monetary Fund. Montreal Protocol No. 4 was intended to align the air carrier's liability for the carriage of goods with that established for the carriage of passengers and registered baggage by the Guatemala City Protocol. *See* Kreindler, *Aviation Law Documents Supp.* at 985-1001.

physically harm passengers, but the passengers of hijacked aircraft understandably experienced extreme terror and psychological trauma. Courts were thus presented with the difficult question whether the Warsaw Convention contemplated recovery for psychological injuries alone. *See* Kreindler, 1 *Aviation Accident Law* § 11.03[2][b] at 11-42.

Several cases have held that Article 17 of the Convention does not allow recovery for purely emotional or psychological injuries unaccompanied by physical trauma. Probably the leading proponent of that view is *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 358 N.Y.S.2d 97 (1974), in which the New York Court of Appeals held that mental injury was not compensable under Warsaw in the absence of physical trauma. The plaintiffs in *Rosman* were passengers aboard a TWA flight which was hijacked while en route from Tel Aviv, Israel, to New York and forced to land in the desert near Amman, Jordan. The passengers were held captive for six days by armed Arab guerillas, but were ultimately released by their captors and returned to New York. The plaintiffs claimed that they suffered extreme psychic trauma as well as physical harm due to the harsh desert conditions. The court held that their claims for recovery based solely on psychic injury were not compensable under Article 17. 358 N.Y.S.2d at 110. The court reasoned that the ordinary meaning of "bodily injury," as opposed to mental injury, connoted "palpable, conspicuous physical injury." 358 N.Y.S.2d at 107. "Only by abandoning the ordinary and natural meaning of the language of article 17," the court argued, "could we arrive at a reading of the terms 'wounding' or 'bodily injury' which might comprehend purely mental suffering without physical manifestations." 358 N.Y.S.2d at 107.[21]

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[21]Two cases have addressed actions for mental anguish not involving a hijacking. In *Kalish v. Trans World Airlines, Inc.*, 89 Misc.2d 153, 390 N.Y.S.2d 1007 (1977), the Civil Court of the City of New York, Queens County, followed *Rosman* and held that a plaintiff who was trampled by

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The *Rosman* analysis was flawed, however, because it failed to consider the French legal meaning of the language in Article 17. The court noted that there was "absolutely no dispute over the proper translation of the liability provisions of the Convention," 358 N.Y.S.2d at 103, and that French law therefore was irrelevant in interpreting the Convention once a proper translation was agreed upon. 358 N.Y.S.2d at 105. In light of the Supreme Court's holding in *Saks* that the French legal meaning must govern our interpretation of Warsaw, and in light of the considerable negative commentary of *Rosman's* approach, we must reject the *Rosman* analysis. *See Saks*, 470 U.S. at ____, 105 S.Ct. at 1342; Mankiewicz at 141-45; Miller at 117-22; J. Kathryn Lindauer, *Recovery for Mental Anguish Under the Warsaw Convention*, 41 J.Air. L. & Com. 333, 336-38, 340 (1975).

Another case which held that psychic injury unaccompanied by physical trauma is not compensable under the Warsaw Convention is *Burnett v. Trans World*

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other passengers who stepped on and jostled her after panic ensued among passengers trapped inside an airliner with an engine on fire was entitled to recover for mental and emotional trauma resulting from her experience.

Also, the Kentucky Court of Appeals held that a passenger cannot recover damages for mental anguish under the Convention arising out of losing a suitcase and its contents. *Trans World Airlines, Inc. v. Christophel*, 500 S.W.2d 409 (Ky.App. 1973). *Christophel* did not involve an "accident" within the meaning of Article 17 and hence has no application here.

It is important to note that today we hold only that Article 17 authorizes recovery for mental anguish unaccompanied by physical trauma only when there has been an "accident" sufficient to trigger the application of Article 17. We express no opinion on claims for mental distress not falling within the confines of Article 17. *See* Grippando, 19 Geo.Wash.J.Int'l L. & Econ. at 60 n. 5; J. Kathryn Lindauer, *Recovery for Mental Anguish Under the Warsaw Convention*, 41 J.Air. L. & Com. 333, 333 n.2 (1975) (noting the possibility of actions for mental distress not based on an "accident").

Airlines, Inc., 368 F.Supp. 1152 (D.N.M. 1973). The court in *Burnett* applied the French language meaning of "bodily injury," and determined that the definition of *lésion corporelle* was "l'atteinte a l'integrite physique" ("an infringement of physical integrity"). This definition, the court stated, "gives not the slightest indication that mental injuries are to be included within its domain." 368 F.Supp. at 1156. The court also rejected the plaintiffs' contention that *blessure* encompasses mental anguish. The court reasoned that

> The critical words of Article 17, "mort, de blessure, and ou de toute autre lesion corporelle" must be examined together in order to ascertain their contextual meaning. Although the *French-English Dictionary of Legal Terms* by Jules Jeraute defines "blessure" to include not only a wound but also hurt or injury, when the term is modified by the subsequent phrase of the provision, it seems apparent that the drafters utilized the word in solely a physical sense.

368 F.Supp. at 1156. The court in *Husserl v. Swiss Air Transport Co.*, 351 F.Supp. 702, 708 (S.D.N.Y. 1972) ("*Husserl I*"), *aff'd per curiam* 485 F.2d 1240 (2d Cir. 1973), based on similar reasoning, also stated in dicta that mental anguish alone is not compensable under Article 17. The district court in this case relied almost exclusively on *Burnett* in reaching its conclusion that Article 17 does not allow recovery for mental injury. 629 F.Supp. at 313-14.

While the court in *Burnett* purported to apply the French *legal* meaning of Article 17, 368 F.Supp. at 1155, it actually considered only the *linguistic* meaning of the French words of Article 17 at issue. *See* Kreindler, 1 *Aviation Accident Law* § 11.03[2][b] at 11-43. We therefore find its analysis unpersuasive. Furthermore, the plaintiffs' action in *Burnett* was founded on state law, 368 F.Supp. at

1153, not on the Warsaw Convention itself, which also places its conclusion on somewhat uncertain footing.

The court in *Burnett* also considered prior drafts of the Convention in concluding that the Convention did not encompass recovery for purely emotional injuries. Eastern asks us to apply those drafts the way the *Burnett* court did, but we view the drafting history of the Convention somewhat differently than do Eastern and the *Burnett* court. The First International Conference on Private Air Law, the predecessor to the Warsaw Convention, initially stated that "[t]he carrier is liable for accidents, losses, breakdowns and delays."[22] The *Burnett* court stated that this language would encompass recovery for both physical and mental injuries, quoting remarks by a French scholar which stated that French law at the time contemplated recovery against a common carrier:

> even in the cases where the carrier in failing to perform its contractual obligations infringed the emotional condition of the passenger: his sentiments of affection in delaying his arrival at funeral ceremonies, the comfort to which he is entitled by placing him in a baggage car, and even for the simple inconvenience of delay in arrival.

Henri Nazeaud, Leon Mazeaud, and Andre Tunc, *Traité Théorique et Pratique de la Responsabilité Civile Délictuelle et Contractuelle* 416-17 (5th ed. 1957), *quoted in Burnett*, 368 F.Supp. at 1157.

The preliminary draft of the Convention itself, adopted in May 1928 by the CITEJA, the interim committee formed after the Paris Conference of 1925, placed all sources of liability against the carrier in one article, Article 21, which provided that:

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[22] "Le transporteur est responsable des accidents, pertes, avaries et retards." *See Burnett*, 368 F.Supp. at 1157 (quoting French translation).

> The carrier shall be liable for damage sustained during carriage:
>
> (a) in the case of death, wounding, or any other bodily injury suffered by a traveler;
>
> (b) in the case of destruction, loss, or damage to goods or baggage;
>
> (c) in the case of delay suffered by a traveler, goods, or baggage.

Warsaw Convention, Preliminary Draft, reprinted in *Minutes* at 264-65.[23] The court in *Burnett* placed great emphasis on this change, stating that

> By thus restricting recovery to bodily injuries, the inference is strong that the Convention intended to narrow the otherwise broad scope of liability under the former draft and preclude recovery for mental anguish alone. Had the

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[23] The French translation of proposed Article 21 read as follows:

> Le transporteur est responsable du dommage survenu pendant le transport:
>
> (a) en cas de mort, de blessure ou de toute autre lesion corporelle subie par ur voyageur;
>
> (b) en cas de destruction, perte ou avarie de marchandises ou de bagages;
>
> (c) en cas de retard subi par un voyageur, des merchandises ou des bagages.

See Miller at 124 n. 74; *Burnett*, 368 F.Supp. at 1157 (reprinting translation).

In the final version of the Convention, the former Article 21 was split into three articles governing carrier liability for injuries to persons, damage or loss of goods, and delay, Articles 17, 18, and 19. The drafters viewed this change purely as a matter of form, and did not intend the change to effect actual carrier liability. *See Minutes* at 84, 205-06 ("it's not a question of new articles but of a new numbering of the articles") (remarks of Mr. Giannini, President of the Drafting Committee).

> delegates desired otherwise, there would have been no reason to so substantially modify the proposed draft of the First Conference.

368 F.Supp. at 1157. We believe the court in *Burnett* was too literal in its interpretation of the new language and overemphasized the importance of the change in wording, at least with regard to the type of compensable injuries. There is no evidence in the negotiating history of the Convention suggesting that the drafters intended to foreclose recovery for any particular type of injury; the drafters simply did not discuss the issue of whether purely emotional injury would be compensable under the Convention. To conclude that this drafting change dealt with a question as important as the exclusion of particular forms of damages, as the court in *Burnett* did, is to place far too much weight on an ambiguous piece of the drafting history of the Convention. *See* Miller at 123-25.

There is a more fundamental problem with the *Rosman* and *Burnett* analysis, the analysis that Eastern urges upon this court. In drawing a sharp distinction between injury caused by physical impact and purely mental injury, the courts in *Rosman* and *Burnett* have taken the common law's distinction between mental and physical injuries[11] and

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[11]"The common law has long been reluctant to award recovery for mental disturbance. Three principal concerns prompted this judicial concern: (1) the problem of permitting recovery for harm that is often temporary in nature; (2) the danger that such claims will be feigned; and (3) the perceived unfairness of imposing heavy burdens upon a defendant for harm the consequences of which appear remote from the wrongful act. W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, David G. Owen, *Prosser and Keeton on Torts* § 54 at 360-61 (5th ed. 1984) ("Prosser"). This concern resulted in the "impact rule," which allowed recovery for emotional injury only if accompanied by some physical infringement upon the plaintiff's person. There has been a continuous relaxation of the impact rule in the United States. *See, e.g., Battalla v. State of New York*, 10 N.Y.2d 237 (1961) (holding that mental anguish standing alone could be compensated); Prosser § 54 at 362-65 (noting development of the law);

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imposed it on Article 17 of the Warsaw Convention, a creation of civil lawyers. *See, e.g., Minutes* at 66, 85; *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 331 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968). As demonstrated earlier in this opinion, there is no such distinction in French law or other civil law systems. We are convinced that *Rosman* and *Burnett* inappropriately imported the common law doctrine.

Other cases have held that Article 17 of the Warsaw Convention does contemplate recovery for mental anguish unaccompanied by physical trauma.

The leading case in this line of cases is *Husserl v. Swiss Air Transport Co.*, 388 F.Supp. 1238 (S.D.N.Y. 1975) ("*Husserl II*"). In *Husserl II*, the court rejected the argument that the French legal meaning of Article 17 governs recovery for mental anguish, and concluded that conflicting interpretations of the term "bodily injury" were "unconvincing and inconclusive." 388 F.Supp. at 1250. The court looked to the purposes of the Warsaw Convention and the intent of its drafters to delineate a comprehensive international scheme of recovery and concluded that

> To effect the treaty's avowed purpose, the types of injuries enumerated should be construed expansively to encompass as many types of injury as are colorably within the ambit of the enumerated types. Mental and psychosomatic injuries are colorably within that ambit and are, therefore, comprehended by Article 17.

388 F.Supp. at 1250.

We agree with the court's conclusion in *Husserl II* that Article 17 encompasses recovery for mental injury, but the

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Lindauer, 41 J.Air L. & Com. at 342 (noting that "the impact rule has been overruled in almost every jurisdiction").

Supreme Court's mandate in *Saks* requires us to analyze more deeply the French legal meaning of Article 17. Furthermore, *Husserl II* was decided before *Benjamins v. British European Airways*, 572 F.Supp. 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979), and its analysis was based on the premise that the Warsaw Convention merely imposed limits on state law causes of action. The court held that "mental injury alone should be compensable, if the otherwise applicable substantive law provides an appropriate cause of action." 388 F.Supp. at 1251. *See also Tarar v. Pakistan International Airlines*, 554 F.Supp. 471, 480 (S.D.Tex. 1982).[25] For the reasons set forth above, we cannot subscribe to this analysis. The *Husserl II* court's statements regarding the policies and goals of Warsaw, however, are instructive.

Other courts have followed *Husserl II* but have added little to its analysis. *See Borham v. Pan American World Airways*, 19 Aviation Cases 18,236 (CCH) (S.D.N.Y. March 5, 1986); *Karfunkel v. Compagnie Nationale Air France*, 427 F.Supp. 971 (S.D.N.Y. 1977); *Krystal v. British Overseas Airways Corp.*, 403 F.Supp. 1322 (C.D.Cal. 1975).

The court in *Palagonia v. Trans World Airlines, Inc.*, 110 Misc.2d 478, 442 N.Y.S.2d 670, 675 (Sup.Ct. 1978), engaged in an exhaustive analysis of the French legal meaning of Article 17, relying on expert testimony to conclude that *lésion corporelle* includes mental injury as recoverable damage even absent physical trauma. Eastern

[25]Plaintiffs cite *Tarar* for the proposition that Article 17 authorizes the recovery of damages for mental distress and other purely psychic trauma. Eastern correctly points out that *Tarar* arose under Article 19 of the Warsaw Convention which deals with damages due to delay in transporting passengers, baggage, or goods. In addition, the court in *Tarar* held that the Warsaw Convention did not create a cause of action and applied Texas law in determining that the plaintiffs stated a cause of action for intentional infliction of emotional distress when the air carrier was negligent in transporting the remains of plaintiffs' decedent to his homeland. 554 F.Supp. at 478-80.

argues that *Palagonia* demonstrates only that there is some scholarly disagreement over the meaning of Article 17, and correctly points out that the court did not examine the prior and subsequent history of the Convention in arriving at its conclusion. However, we have studied those materials and find that they support *Palagonia's* analysis and conclusion that mental injury alone is recoverable. We find the *Palagonia* analysis persuasive.

Finally, we conclude that our interpretation is supported by the policies underlying the Convention. Our interpretation is consistent with the policy of the Convention to provide a comprehensive scheme of rules governing international air travel. *Husserl II*, 388 F.Supp. at 1250. It is also consistent with the important goal of the Convention to ensure uniformity, both in matters of documentation and matters of liability. *Id.* at 1250. Were we to accept Eastern's contention that Article 17 does not encompass recovery for emotional trauma, the plaintiffs nonetheless might[26] be able to successfully pursue their state law cause of action for intentional infliction of emotional distress. *See* Part II, *supra*. Such a state law cause of action would not be uniformly available. More important, this

[26]We emphasize that we expressly do not decide whether the state law cause of action would be preempted if we had held that the Warsaw Convention does *not* encompass a cause of action for purely mental injury. That preemption issue is different from the one we address in Part IV. That is, in Part IV, we decide that there is preemption in light of our holding that the Convention does create a cause of action encompassing purely mental injury. The preemption issue we do not decide is more difficult and subtle than the one we do decide, and in fact in a related case the District Court of Appeal of Florida, Third District, has held that air travelers may "avail themselves of remedies available under local law when the Warsaw Convention fails to provide a cause of action." *King v. Eastern Airlines, Inc.*, 536 So.2d 1023, 1031 (1987). Our statement in text that plaintiffs *might* be able to pursue their state law cause of action without a $75,000 limit on liability is of course a possibility only if the Florida court is correct.

might[27] put the plaintiffs in position to recover damages for emotional trauma which exceeded the $75,000 limit set by the Montreal Agreement. It hardly seems consistent with the intent of the Convention to place a strict cap of $75,000 on damages for death or harm resulting from physical impact while allowing unlimited recovery for purely emotional or psychological injuries.

4. Summary

After careful consideration of the French legal meaning of the treaty terms, the concurrent and subsequent legislative history and conduct of the parties, the case law and the policies underlying the Warsaw Convention, we are persuaded that Article 17 provides recovery for purely mental injuries unaccompanied by physical trauma. It is important to note that this does not mean that courts will allow recovery for every claim for mental injury up to $75,000. The damages actually sustained by the plaintiffs must be proved.

IV. PREEMPTION

We are bound by the Florida court's decision that the facts of this case state a claim under Florida law for intentional infliction of emotional distress.[28] Part II, *supra*. In addition, we hold today that Article 17 creates a cause of action for emotional injuries unaccompanied by physical trauma. Part III, *supra*. Because both state law and the Warsaw Convention may allow recovery for these alleged injuries, we are asked to determine whether the Convention preempts the plaintiffs' state law cause of action.

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[27] *See* note 26, *supra*.

[28] If the Supreme Court of Florida, which has accepted jurisdiction over the *King* case, holds that a cause of action for intentional infliction of emotional distress does not exist under Florida law, the district court will be bound by that holding on remand. Of course, if there is no state law cause of action, there would be no question of preemption. Our discussion of the preemption issue would become moot. *See* Part II, *supra*.

Plaintiffs argue that Article 17 of the Convention does not preempt all remedies available to an international air traveler; rather, they contend, it excludes recovery based on local law only for injuries which are inconsistent with the Warsaw Convention. The plaintiffs concede, as they must, that where local law conflicts with the Convention, the rules of the Convention must prevail. Eastern contends that the Warsaw Convention provides the exclusive avenue of recovery for passengers involved in an "accident" within the meaning of Article 17, and thus that all of plaintiffs' state law claims are barred.

As an international treaty accepted by the United States, the Warsaw Convention is binding. *Dalton v. Delta Airlines, Inc.*, 570 F.2d 1244, 1246 (5th Cir. 1978). The Supremacy Clause of the United States Constitution provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S.Const.art.VI. Any state law in conflict with a treaty of the United States is invalid. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-58, 98 S.Ct. 988, 994 (1978). Therefore, the Warsaw Convention preempts any state law which is inconsistent with it. *Highlands Insurance Co. v. Trinidad and Tobago (BWIA International) Airways Corp.*, 739 F.2d 536, 537 n. 2 (11th Cir. 1984) ("Warsaw Convention preempts local law in areas where it applies"); *Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152, 1155 (D.N.M. 1973).

Courts have not hesitated to apply this principle in Warsaw Convention cases. In *Butler v. Aeromexico*, 774 F.2d 429 (11th Cir. 1985), for example, this court held that the district court did not err in awarding compensatory damages to crash victims when Alabama wrongful death law provided only for recovery of punitive damages. The court stated that

Alabama law "conflicts with the tenor of the Warsaw Convention, which contemplates compensation for victims of air disasters." 774 F.2d at 431. *See In re Aircrash in Bali, Indonesia On April 22, 1974*, 684 F.2d 1301, 1307-08 (9th Cir. 1982) (court held that "California law is preempted by the Warsaw Convention to the extent that California law would prevent the application of the Convention's limitation on liability"), *later appeal*, No. 86-6453, 1989 U.S. App. LEXIS 3725 (9th Cir. Mar. 27, 1989); *Kapar v. Kuwait Airways Corp.*, 845 F.2d 1100, 1104 (D.C.Cir. 1988) ("admiralty cases involving international air transportation *must* satisfy the Convention's requirements") (emphasis in original). These cases and the Supremacy Clause itself squarely stand for the proposition that when state law conflicts with a provision of the Warsaw Convention, the rules of the Convention must govern.

Conversely, where the Warsaw Convention does not apply at all — for example, to an injury suffered after disembarkation[29] — causes of action based on state law can go forward. The Convention does not prohibit state or federal causes of action based on situations which the Convention was not intended to govern. The title of the Convention itself suggests that it was not intended to cover the entire relationship between air carriers and passengers — the Convention was to unify "Certain Rules Relating to International Transportation by Air," not *all* rules relating to international transportation by air. The delegates to the Convention carefully chose to include this qualification in the title.[30] In those aspects of the passenger-carrier

[29] *See Martinez Hernandez v. Air France*, 545 F.2d 279 (1st Cir. 1976), *cert. denied*, 430 U.S. 950 (1977).

[30] *Minutes* at 188 (statement of Mr. Giannini, President of the drafting committee) ("We have adopted the title: 'Convention for the Unification of Certain Rules Relating to International Carriage by Air'. This suffices to say that this Convention does not provide for the entire matter and gives satisfaction to certain delegations such as the

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relationship which the Convention does not address, it does not apply at all, and local law must govern. *See* Mankiewicz at 13-15.

Courts considering this question have adhered to this distinction, often permitting claims against air carriers to proceed on other grounds after concluding that the Warsaw Convention did not apply.[31] *See* Kreindler, 1 *Aviation Accident Law* § 11.07 at 11-93,94; *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130 (3d Cir. 1984) (where Article 17 of the Warsaw Convention was not applicable because there was no "accident," the court held that there was no preemption of plaintiff's state law cause of action for negligent failure to assist a sick passenger suffering from an attack associated with a preexisting hernia condition), *cert. denied*, 470 U.S. 1059 (1985).[32]

We easily conclude that this case falls in the first category — i.e., it is a case where the Convention applies and

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Czechoslovak Delegation, which asked that the word 'Certain' be added."). *See Minutes* at 134-35; 176; 182-83 (statements emphasizing that the Convention was not intended to govern completely international air transportation).

[31] This is the approach taken by the Florida Court of Appeals in the *King* case. After it held that the Convention did not create a cause of action for emotional injury, the court held that the Convention did not preempt the state law claim for intentional infliction of emotional distress. *See* 532 So.2d at 1075-76.

[32] *See also Wogel v. Mexicana Airlines*, 821 F.2d 442 (7th Cir.) (action for discriminatory "bumping" from flight; held that since plaintiffs sought damages for the bumping itself under the Federal Aviation Act rather than incidental damages due to delay, the claims fell outside the scope of the Warsaw Convention), *cert. denied* ____ U.S. ____, 108 S.Ct. 291 (1987); *Schmidkunz v. Scandinavian Airlines System*, 628 F.2d 1205, 1207 (9th Cir. 1980) (reaching plaintiff's negligence claim after disposing of her Warsaw claim); *Martinez Hernandez v. Air France*, 545 F.2d 279, 284 (1st Cir. 1976) (holding that passenger injured after disembarkation is left "to remedies of local law"), *cert. denied*, 430 U.S. 950 (1977).

preempts inconsistent local law. The engine failure in question was an "accident" within the meaning of the Convention, and we have determined in Part III that Article 17 applies in this case and provides recovery for mental injuries unaccompanied by physical impact. Where the Convention applies, it preempts any inconsistent state law provision. *Butler v. Aeromexico*, 774 F.2d 429 (11th Cir. 1985). Plaintiffs' brief concedes, and we agree, that Eastern will be entitled to invoke the $75,000 per passenger limitation and that the other provisions of the Convention will apply. Therefore, to the extent that the cause of action for intentional infliction of emotional distress recognized under Florida law conflicts with the cause of action we recognized under Article 17 of the Convention, Florida law is preempted.

Eastern suggests that we hold that the Convention provides the exclusive source of a right to recovery and thus completely preempts state law causes of action in accidents involving international air transportation. At this stage of the case, however, we determine only that the Convention preempts those aspects of plaintiffs' state law claims which are inconsistent with the Convention. We decline to speculate further on the issue of whether the Warsaw Convention entirely preempts state law causes of action once its provisions are triggered by an "accident" within the meaning of Article 17.[33] The plaintiffs and Eastern concede

[33] It is evident that where the Convention applies it preempts inconsistent local law. Several courts have gone farther, however, and have concluded that the Convention is to be both the exclusive avenue of recovery and the exclusive remedy in the areas it governs. *See Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456, 459 (5th Cir. 1984) (court refused to award attorney's fees under Texas law and held that the Convention preempted plaintiff's negligence cause of action, stating that "[h]aving concluded that the Warsaw Convention creates the controlling cause of action, we further conclude that it preempts state law in the areas covered;" court implied that all state law causes of action would necessarily conflict with the Convention

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that the Convention's limitation on liability, the Montreal

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due to the interests of national and international uniformity and must therefore be preempted), *cert. denied*, 469 U.S. 1186 (1985); *Abramson v. Japan Airlines, Co.*, 739 F.2d 130, 134 (3d Cir. 1984) (court indicated that it would hold that the Convention is the exclusive basis for recovery), *cert. denied*, 470 U.S. 1050 (1985); *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978) ("the desirability of uniformity in international air law can best be recognized by holding that the Convention, otherwise universally applicable, is also the universal source of a right of action"), *cert. denied*, 439 U.S. 1114 (1979); *Stanford v. Kuwait Airlines Corp.*, 1989 U.S.Dist. LEXIS 614 (S.D.N.Y. Jan. 16, 1989) ("[t]he terms of the Warsaw Convention exclusively govern the rights and liabilities of the parties"); *Harpalani v. Air India, Inc.*, 622 F.Supp. 69, 73 (N.D.Ill. 1985) (Warsaw claim provides exclusive remedy for delays in air transportation, plaintiffs' non-Warsaw claims dismissed), *disapproved on other grounds Wolgel v. Mexicana Airlines*, 821 F.2d 442, 445 (7th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 291 (1987); *Jahanger v. Purolator Sky Courier*, 615 F.Supp. 29, 32 (E.D.Pa. 1985) ("[w]here the Warsaw Convention applies, its limitations and theories of liability are exclusive"); *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F.Supp. 833, 844-45 (E.D.N.Y. 1982) ("Warsaw Convention specifically controls and exclusively governs any and all claims for damages arising out of the death or injury of a passenger engaged in international air transportation, and plaintiffs cannot maintain a separate wrongful death action for damages under California law"), *aff'd* 705 F.2d 85 (2d Cir.), *cert. denied sub nom. Polskie Linie Lotnicze (LOT Polish Airlines) v. Robles*, 464 U.S. 845, 104 S.Ct. 147 (1983).

Some courts have taken the contrary view, holding that the Convention merely preempts inconsistent provisions of state law. *See Johnson v. American Airlines, Inc.*, 834 F.2d 721, 723 (9th Cir. 1987) ("[s]tate-law claims allowing damages for injuries to goods in international air transportation can only be maintained subject to the conditions and limits outlined in the Warsaw Convention"); *In re Mexico City Air Crash of October 31, 1979*, 708 F.2d 400, 414 n. 25 (9th Cir. 1983) (best explanation for the wording of Article 24(1) appears to be that the delegates did not intend that the cause of action created by the Convention to be exclusive); *In re Aircrash in Bali, Indonesia On April 22, 1974*, 684 F.2d 1301, 1311 n. 8 (9th Cir. 1982) ("the Convention has never been read to *limit* plaintiffs to a cause of action arising thereunder, but rather to limit the recovery in suits for injury") (emphasis in original),

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Agreement's waiver of the airlines' due care defense, and the other provisions of the Warsaw system apply in this case. The only aspect of their claim under state law which the plaintiffs argue differs from the Convention but is nevertheless consistent with its scheme of recovery is their claim for punitive damages, to which we now turn.

V. PUNITIVE DAMAGES

Plaintiffs in this case argue that Eastern's actions entitle them to punitive damages. Their argument that they are entitled to punitive damages is based both on the Warsaw Convention itself and on their state law cause of action for intentional infliction of emotional distress. We deal with these contentions in turn.

A. *Punitive Damages Under the Warsaw Convention*

The plaintiffs argue that Article 25 of the Warsaw Convention creates an independent cause of action which authorizes the recovery of punitive damages. Plaintiffs argue that Article 25 not only removes the limitation on compensatory damages contained in Article 22 as modified by the Montreal Agreement, but that Article 25 also creates

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later appeal, No. 86-6453, 1989 U.S. App. LEXIS 3725 (9th Cir. Mar. 27, 1989); *Tokio Marine & Fire Insurance Co. v. McDonnell Douglas Corp.*, 617 F.2d 936, 942 (2d Cir. 1980) (stating that Article 24 "indicates that [the drafters] did not intend that cause of action to be exclusive"); *In re Air Crash Disaster at Gander, Newfoundland*, 660 F.Supp. 1202, 1221 (W.D.Ky. 1987) (Warsaw not intended to displace state law); *Rhymes v. Arrow Air, Inc.*, 636 F.Supp. 737, 740 (S.D.Fla. 1986) (Article 24(1) "contemplates the application of the convention limitations to actions founded on a basis other than that of the convention"); *Perkin Elmer Computer Systems Div. v. Trans Mediterranean Airways, S.A.L.*, 107 F.R.D. 55, 61 (E.D.N.Y. 1985) ("state law cause of action may be available, even if a federal claim exists under the Convention").

The Supreme Court expressly has declined to address the question whether the Warsaw Convention provides the exclusive grounds for relief for an airline passenger involved in an accident. *Air France v. Saks*, 470 U.S. 392, ____, 105 S.Ct. 1338, 1347 (1985).

a cause of action itself which authorizes recovery of punitive damages. We reject this contention. The English translation[24] of Article 25 provides that:

> (1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be the equivalent to wilful misconduct.
>
> (2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

The structure of the Convention, the subsequent interpretation by the parties, and the unanimous case law persuade us that Article 25 operates only to remove the liability limitations of Article 22 in cases of "willful misconduct" by the air carrier, and was not intended to provide an independent right of action.

The provisions of the Convention which create liability for injuries to passengers, damage to baggage and cargo, and delay, Articles 17, 18, and 19, are entirely compensatory in tone and structure. *In re Air Crash Disaster at Gander, Newfoundland*, 684 F.Supp. 927, 931 (W.D.Ky. 1987). If a litigant is able to state a claim pursuant to one of these provisions, then Article 22, as modified by the Montreal Agreement, imposes a $75,000 limit on the carrier's liability which is created in Articles 17-19. In cases of willful misconduct, Article 25 strips the carrier of the liability

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[24] Plaintiffs have not suggested an alternative French legal meaning of Article 25, nor has our research uncovered any, with the exception of the controversy surrounding the precise meaning of "willful misconduct," which we discuss briefly in Part VI, *infra*.

limitation on compensatory damages. *See* Speiser and Krause § 11.36 at 761-62.

Subsequent conduct of the contracting parties supports this interpretation. This court has stated that "[m]inutes of the negotiations on the Hague Protocol, an amendment to the Convention, indicate that the delegates understood article 25 as referring only to article 22, which establishes monetary limits for recoveries under the Convention." *Highlands Insurance Co. v. Trinidad and Tobago (BWIA International) Airways Corp.*, 739 F.2d 536, 539 (11th Cir. 1984); *citing* 1 International Conference on Private Air Law, *Minutes* at 166, ICAO doc. 7686-LC/140 (1955). In fact, the amended Article 25 specifically stated that "[t]he limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result." Hague Protocol Art. XIII, *reprinted in* Kreindler, *Aviation Law Documents Supp.* at 959.[20]

Thus, the structure of the Convention and the subsequent actions of the contracting parties indicate that the phrase "provisions of this convention which exclude or limit his liability" used in Article 25 refers to the limitation on liability contained in Article 22, and does not create an independent cause of action contemplating punitive

[20]The amended Article 25 in Montreal Protocol No. 4 uses similar language, stating that "[i]n the carriage of passengers and baggage, *the limits of liability specified in Article 22 shall not apply* if it is proved that the damage resulted" from an intentional or reckless act on the part of the carrier or his employees. Montreal Protocol No. 4 Art. IX, *reprinted in* Kreindler, *Aviation Law Documents Supp.* at 997 (emphasis added). While the United States has not ratified the Hague or Montreal Protocols, we, like other courts, find their clarification of the operation of Article 25 to be instructive. *Highlands*, 739 F.2d at 539 n.10. *See Saks*, 470 U.S. at ____, 105 S.Ct. at 1344 (Court relied on subsequent actions by contracting parties which have not been ratified by the Senate in interpreting Article 17 of the Convention).

damages. *See* H. Drion, *Limitation of Liabilities in International Air Law* 70, 260-61 (1954) (Article 25 not intended to refer to any source of law outside of the Convention).

The cases which have addressed this issue uniformly have concluded that Article 25 does not create an independent right of action, but rather serves only to remove the limitation on liability contained in Article 22 of the Convention. *Highlands*, 739 F.2d at 539. *See Stone v. Mexicana Airlines, Inc.*, 610 F.2d 699, 700 (10th Cir. 1979) (allegations of willful misconduct do not avoid statute of limitations contained in Article 29(1)); *In re Air Crash Disaster at Gander, Newfoundland*, 684 F.Supp. 927, 932 (W.D.Ky. 1987) (Article 25 an exception to limits on compensatory damages as authorized in Article 17, not an independent basis for awarding punitive damages); *Harpalani v. Air India, Inc.*, 634 F.Supp. 797, 799 (N.D.Ill. 1986) ("Article 25 is most reasonably interpreted as an exception to the Convention's limitations on the recovery of compensatory damages, not as authority for a form of damages not permitted elsewhere in the Convention"), *disapproved on other grounds Wolgel v. Mexicana Airlines*, 821 F.2d 442, 445 (7th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 291 (1987); *Magnus Electronics, Inc. v. Royal Bank of Canada*, 611 F.Supp. 436, 443 (N.D.Ill. 1985) ("*All* the cases teach the 'exclude or limit his liability' language was aimed at the familiar provisions of Article 22") (emphasis in original).[20]

[20]The cases that the passengers cite for the proposition that Article 25 creates an independent basis for liability simply do not so hold. In *Butler v. Aeromexico*, 774 F.2d 429 (11th Cir. 1985), the court upheld a damage award in excess of the $75,000 Warsaw Convention limitation based on Article 25. The court in *Butler* framed the issue as "whether the conduct of defendant's crew amounted to 'wilful misconduct' within the meaning of Article 25 of the Warsaw Convention *so as to render inapplicable the convention's $75,000.00 limitation of liability provision (Article 22)*." 774

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Highlands' analysis of Article 25 was in the context of the applicability of the notice provisions of Article 26 in cases of willful misconduct. In *Highlands*, a shipper of goods failed to give proper notice to the airline pursuant to Article 26 of the Convention that his goods had been damaged during shipment. The shipper argued, *inter alia*, that the airline's willful misconduct served to remove the notice requirements. The court squarely rejected this argument, stating that "article 25 does not deprive the carrier of the article 26 notice provisions." 739 F.2d at 539. In light of the structure of the Convention, subsequent interpretations of the parties, and unanimous case law, we readily extend the principle articulated in *Highlands* and hold that Article 25 of the Warsaw Convention does not create an independent cause of action for willful misconduct which would entitle plaintiffs to punitive damages."

B. *Punitive Damages Under State Law*

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F.2d at 430 (emphasis added). Nowhere in *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301 (9th Cir. 1982), *later appeal*, No. 86-6453, 1989 U.S. App. LEXIS 3725 (9th Cir. Mar. 27, 1989), does the court suggest that Article 25 offers an independent source of a right of action. In fact, when discussing the Convention in general terms, the court states that Article 25 "excepts from the limit on the carrier's liability, injury or death caused by the carrier's 'willful misconduct.'" 684 F.2d at 1305. Finally, in affirming the court below, the court in *Compania de Aviacion Faucett S.A. v. Mulford*, 386 So. 2d 300, 301 (Fla. 3d D.C.A. 1980), expressly stated that "the lower court found that the airline had been guilty of 'wilful misconduct' under Article 25(1) so as to render inapplicable the provisions of Article 22(2) of the Warsaw Convention." It is difficult to construe this language as suggesting that Article 25 operates as a separate ground for recovery.

"Plaintiffs do not argue that the cause of action for personal injuries created by Article 17 authorizes recovery of punitive damages. We agree that Article 17 contemplates only compensatory damages, which we see below has considerable significance in our rejection of plaintiffs' argument that the Convention's "silence" on the issue of punitive damages allows them to recover punitive damages under state law.

Plaintiffs argue that recovery of punitive damages under state law is not inconsistent with the Warsaw Convention. They contend that the Convention's silence on the question of punitive damages means that recovery of punitive damages under Florida law is allowed.[13] The unofficial English translation[14] of Article 24 of the Convention provides that

> (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 24 thus requires this court to determine whether an award of punitive damages is contemplated by the "conditions and limits set out in this convention." In other words, the issue is whether an award of punitive damages would be in conflict with the scheme of liability provided for in the Warsaw Convention. We conclude that there would be a conflict, and therefore hold that plaintiffs' claim for

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[13]Because the district court held that plaintiffs could not state a cause of action under the Warsaw Convention, 629 F.Supp. at 312-14, it did not address the question of whether awarding punitive damages under state law would conflict with the Convention.

[14]While the French legal meaning of the Warsaw Convention controls its interpretation, see Part III, *supra*, we need not set out the original French text of Article 24 here because the precise legal meaning of the terms has not been questioned. *See Denby v. Seaboard World Airlines, Inc.*, 737 F.2d 172, 177 (2d Cir. 1984) (Friendly, J.) ("As a practical matter, however, American lawyers and courts have initially addressed themselves to the English text and have consulted the French text only when there is a substantial contention that it has a different meaning.").

punitive damages under Florida law is preempted by the Warsaw Convention.

Before we address the question of whether an award of punitive damages under state law would conflict with the Convention, we must first determine whether the Convention itself contemplates recovery for punitive damages.[40] We have already rejected plaintiffs' argument that Article 25 creates a separate cause of action for "willful misconduct" that contemplates the recovery of punitive damages. For the reasons indicated below we also conclude

[40]Apart from the liability limitations contained in Article 22 of the Convention, the issue of the computation of damages generally is governed by local law, except, of course, where such law conflicts with the Convention. *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1987); *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1315 (9th Cir. 1982), *later appeal*, No. 86-6453, 1989 U.S. App. LEXIS 3725 (9th Cir. Mar. 27, 1989); *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 858 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); *Cohen v. Varig Airlines*, 62 A.D.2d 324, 405 N.Y.S.2d 44, 49 (1978). *See* Kreindler, 1 *Aviation Accident Law* § 11.08 at 11-94. As the discussion in the text indicates, the issue in this case — whether the state law claim for punitive damages is inconsistent with the Convention — is not merely a matter of computation of damages; rather we hold that the state law claim for punitive damages is inconsistent with the compensation scheme established by the Convention.

Courts sometimes have had difficulty determining exactly when a local law damage provision conflicts with the Convention. *See, e.g. O'Rourke v. Eastern Air Lines, Inc.*, 553 F.Supp. 226, 228 (E.D.N.Y. 1982) (determination whether prejudgment interest available in action arising out of plane crash "must be determined solely with respect to the Warsaw Convention/Montreal Agreement. All local law to the contrary. . . must therefore be preempted"), *aff'd in relevant part* 730 F.2d 842, 851-53 (2d Cir. 1984) (court refused to allow prejudgment interest in a case governed by the Convention); *Deere & Co. v. Deutsche Lufthansa Aktiengesellschaft*, 855 F.2d 385, 391-92 (7th Cir. 1988) (same). *But see Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256 (5th Cir. 1984) (prejudgment interest, subject to damage limits, allowed in a Warsaw case because it furthers the purpose of speeding settlement and recovery); *Eli Lilly Argentina, S.A. v. Aerolineas Argentinas*, 133 Misc.2d 858, 508 N.Y.S.2d 865 (N.Y.Civ. 1986) (same).

that Article 17 does not authorize recovery of punitive damages. In fact, plaintiffs do not argue that it does; rather, they contend that they have both a state law cause of action for intentional infliction of emotional distress (which permits recovery of punitive damages in appropriate cases) and a Warsaw Convention cause of action (which is silent on punitive damages). Because the Convention is silent on the issue, they contend that an award of punitive damages would be consistent with the provisions of the Convention.

It is true that the text of the Convention does not explicitly address the issue of punitive damages. However, we do not think plaintiffs can take much comfort in this "silence." The basis for recovery for passengers who suffer death or personal injury in international air travel is Article 17 of the Convention. Our study of the text and structure of the Convention, and the concurrent and subsequent legislative history persuade us that Article 17 is entirely compensatory in nature.

As we have previously noted, Article 17 of the Convention provides that "Le transporteur est responsable du *dommage survenu* en case de mort, de blessure ou de toute autre lésion corporelle. . . " (emphasis added). We have already concluded that *lésion corporelle* encompasses the concept of mental or emotional injury. Part III, *supra*. Plaintiffs' contention that the Convention authorizes the recovery of punitive damages requires us to analyze the meaning of *dommage survenu* ("damage sustained") in order to determine whether that phrase allows punitive damages.

Plaintiffs have pointed to no authority suggesting that the French legal meaning of Article 17 permits recovery of punitive damages, and we have found no such authority. *See Saks*, 470 U.S. at ____, 105 S.Ct. at 1342 (French legal meaning controls terms of Convention). In fact, what we have found indicates otherwise. In civil law systems, an action under the Warsaw Convention sounds in contract. *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 331

(5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); Nicolas Mateesco Matte, *Treatise on Air-Aeronautical Law* 403-04 (1981). The parties may agree to a penalty clause, but punitive damages generally are not available in contract actions. *See* Marcel Plainol and George Ripert, 2 *Treatise on the Civil Law* No. 247 at 149 (11th ed. 1959) (Louisiana State Law Institute translation) ("[t]he indemnity should represent exactly as possible the real damage suffered by the creditor"); Barry Nicholas, *French Law of Contract* 226 (1982) ("The overriding principle [in assessing damages] is that damages should compensate the creditor for the loss suffered. The expression of disapproval of the debtor's conduct has no place in the assessment of damages").

The plaintiffs in *In re Air Crash Disaster at Gander, Newfoundland*, 684 F.Supp. 927 (W.D.Ky. 1987), argued that the word "*survenu*" in Article 17 was more appropriately translated as "happened" or "arisen," not as "sustained." The court declined to accept this interpretation, noting that the plaintiffs cited no authority for their assertion. 684 F.Supp. at 931. The term *dommage survenu* or "damage sustained" is entirely compensatory in tone. *Gander*, 684 F.Supp. at 931. Punitive damages are intended to penalize the wrongdoer in order to benefit society, and as such are not "sustained" by the victim. *See* Morris, Punitive Damages in Tort Cases, 44 Harv.L.Rev. 1173, 1183 (1931).

We also find significance in the fact that the only provision of the Convention which addresses remedies for intentional or reckless acts by the carrier, acts usually associated with the recovery of punitive damages in the United States,[11] did not address the issue of punitive damages at all. Rather, as we have already demonstrated, Article 25 provided only that the strict limit on liability for

[11] *See Dorsey v. Honda Motor Co.*, 655 F.2d 650, 657-58 (5th Cir. Unit B 1981), *cert. denied*, 459 U.S. 880 (1982), *later proceeding* 730 F.2d 675 (11th Cir. 1984); Prosser § 2 at 9-10.

compensatory damages was to be lifted in cases of intentional or willful acts.

Nowhere in the Minutes of the Convention is there any mention of deterring misconduct by imposing punitive damages on derelict air carriers. *See generally Minutes*. Thus, the concurrent legislative history supports the interpretation that the Convention contemplates recovery of only compensatory damages.

Unlike *lésion corporelle*, subsequent interpretations of the parties have cast no doubt as to the accuracy of the translation of *dommage survenu* as "damage sustained." The official English translation adopted at the Hague in 1955, the United States State Department translation which accompanied the Convention when it was ratified by the Senate, and the Guatemala Protocol all use the "damage sustained" language. *See* 49 U.S.C. note following § 1502 (American translation), Kreindler, *Aviation Law Documents Supp.* at 955, 975 (official English translation, Guatemala Protocol).

We are thus convinced that the plaintiffs' claim for punitive damages finds no support in the Convention, either in those provisions creating liability (Articles 17-19) or in the provision which allows full compensation in cases of willful misconduct by the air carrier (Article 25). Plaintiffs contend, however, that their state law claim for punitive damages does not conflict with the Convention's "silence" on punitive damages. We disagree, and conclude that recovery of punitive damages under state law would conflict with the scheme of recovery established by the Convention.

We note at the outset the significant difference between punitive damages and compensatory damages. Punitive damages are not intended to compensate victims, but rather are private fines, awarded in addition to what is necessary to compensate victims, levied by civil juries to punish a defendant for his conduct and to deter others from engaging

in similar conduct in the future. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 2759 (1981); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48, 99 S.Ct. 2121, 2125-26 (1979); Prosser § 2 at 9-15.[42] As our discussion has indicated, the Warsaw Convention contemplated recovery of only compensatory damages. We believe that the intent of the Convention to provide compensatory damages suggests that it would be inconsistent to allow punitive damages which serve a purpose very different from compensating victims.

This conclusion is supported by the purposes and goals of the Convention to limit strictly the liability of the airlines and to provide a uniform and comprehensive scheme of liability. The Convention was intended to place strict limits on air carrier liability for accidents, as well as to ensure at least a measure of compensation for accident victims. *See* Lowenfeld and Mendelsohn, 80 Harv.L.Rev. at 498-501; Part III, *supra*. Holding that the punitive damages are unavailable in an action governed by the Warsaw Convention furthers the goal of certainty of liability. *See Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir.) ("It is beyond dispute that the purpose of the liability limitation prescribed by Article 22 was to fix at a definite level *the cost to airlines* of damages sustained by their passengers and of insurance to cover such damages."), *cert. denied*, 434 U.S. 922 (1977). Allowing punitive damages in Warsaw Convention cases would undermine this strict limitation of liability, which was the central feature of the Warsaw

[42] While mental injuries (*dommage moral* in the civil law) are intangible in nature, allowing recovery for them is intended to be compensatory, and is in no way meant to penalize the wrongdoer. *See McGee v. Yazoo & M.V.R. Co.*, 206 La. 121, 19 So.2d 21 (1944) ("damages for mental anguish or suffering are actual rather than exemplary or punitary"); Barry Nicholas, *French Law of Contract* 220-23 (1982); Marcel Plainol and George Ripert, 2 *Treatise on the Civil Law* Nos. 867-868A at 470-73 (11th ed. 1959) (Louisiana State Law Institute translation).

system. *See Trans World Airways, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 256, 104 S.Ct. 1776, 1784 (1984).

The recovery of punitive damages would also be inconsistent with the goal of the Convention to provide a comprehensive and uniform scheme governing the liability of the airlines in the areas covered by the Convention. The text of the Convention points out the necessity of uniformity and the desire for a comprehensive set of rules in those areas where the signatories intended the Convention to apply. The preamble of the Convention declares the intent of the signatory nations as "regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier." Article 1(1) of the Convention provides that "[t]his convention *shall* apply to *all* international transportation of persons, baggage, or goods performed by aircraft for hire" (emphasis added). Uniformity of rules governing international air operations is a primary goal of the Convention. *See Reed v. Wiser*, 555 F.2d 1079, 1090 (2d Cir.) ("fundamental purpose of the signatories to the Warsaw Convention, which is entitled to great weight in interpreting that pact, was their desire to establish a uniform body of world-wide liability rules to govern international aviation, which would supersede with respect to international flights the scores of differing domestic laws") (footnote omitted), *cert. denied*, 434 U.S. 922 (1977); *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 337-38 (5th Cir. 1967) ("The Court has an obligation to keep interpretation as uniform as possible."), *cert. denied*, 392 U.S. 905 (1968). This uniformity interest applies not only internationally, but also within the United States as well. *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456, 459 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985). It would contravene the Convention's goal of uniformity should there be recovery for punitive damages in some forums and not in others.

We have found no case in which a court awarded punitive damages in a case governed by the Convention, and we decline to depart from this uniformity. In *Butler v. Aeromexico*, 774 F.2d 429 (11th Cir. 1985), this court held that the Convention preempted Alabama law regarding damages for wrongful death. In that case, the court stated that Alabama law, which allows recovery for only punitive damages in a wrongful death case, "conflict[ed] with the tenor of the Warsaw Convention, *which contemplates compensation for victims of air disasters*." 774 F.2d at 431 (emphasis added). While the court in *Butler* did not squarely hold that only compensatory damages are available under the Warsaw system, the decision clearly points to that result, which we make explicit today.

The only decisions which have explicitly confronted the issue also support our conclusion. After undertaking an analysis similar to the one above, the court held in *In re Aircrash Disaster at Gander, Newfoundland*, 684 F.Supp. 927 (W.D.Ky. 1987), that "the Warsaw Convention by its terms and history allows *compensatory* damages claims against carriers arising under state law but excludes *punitive* damages claims" in wrongful death actions under Article 17. 684 F.Supp. at 933 (emphasis in original). The court in *Gander* also held that the Convention preempted plaintiffs' state law claims for punitive damages. *Id.; see Harpalani v. Air-India, Inc.*, 634 F.Supp. 797 (N.D.Ill. 1986) (court struck plaintiffs' claim for punitive damages under Article 19 of the Convention), *disapproved on other grounds Wolgel v. Mexicana Airlines*, 821 F.2d 442, 445 (7th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 291 (1987).[43]

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[43]Plaintiffs cite *Hill v. United Airlines*, 550 F.Supp. 1048 (D.Kan. 1982), to support their contention that the Convention contemplates recovery of punitive damages. In *Hill*, the court claimed damages for intentional misrepresentation arising out of international air transportation. The court initially found that "[l]iability, if any, is predicated on defendant's commission of the tort of misrepresentation, a

(Footnote continued on next page)

We conclude that the Warsaw Convention itself provides for recovery of compensatory damages only, and that it would be inconsistent with the Convention's scheme of recovery to allow plaintiffs to recover punitive damages on their state law cause of action. Therefore, we hold that the Convention preempts plaintiffs' claim under Florida law for punitive damages.

VI. WILLFUL MISCONDUCT ON REMAND

While it is clear that Article 25 does not provide an independent basis for holding Eastern liable for punitive damages, it is possible that the facts alleged here constitute willful misconduct and serve to remove the liability limitations on compensatory damages of Article 22 and the Montreal Agreement."

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circumstance completely outside of the Warsaw Convention." 550 F.Supp. at 1054. The court went on, however, to state that "while the Warsaw Convention is basically the controlling law in this case, plaintiffs have properly invoked the provisions of Article 25(1), which make an exception to defendant's limited liability and might entitle plaintiffs to recover actual and punitive damages. . . . " 550 F.Supp. at 1056. It is not clear whether the court in *Hill* held that punitive damages are recoverable in an action governed by the Convention, since the court appeared to hold that the Convention was inapplicable to the facts of that case. In any event, to the extent that *Hill* authorizes recovery of punitive damages under the Warsaw Convention, we decline to accept its holding. *See In re Air Crash Disaster at Gander, Newfoundland*, 684 F.Supp. 927, 933 (W.D.Ky. 1987).

"The precise formulation of Article 25 has been a subject of international scholarly and judicial dispute. The French version of Article 25(1) read as follows:

> (1) Le transporteur n'aura pas le droit de se prevaloir des dispositions de la presente Convention qui excluent ou limitent sa responsabilite, si le dommage provient de son dol ou d'une faute qui, d'apres la loi du tribunal saisi, est considere comme equivalente au dol.

(Footnote continued on next page)

This question must first be addressed by the trial court on remand. Willful misconduct is a question of fact and should be addressed in the first instance by the district court. *Butler v. Aeromexico*, 774 F.2d 429, 432 (11th Cir. 1985); *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130, 135 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985). Determining whether willful misconduct occurred in a given case is an extremely fact-sensitive inquiry. The plaintiff has the burden of proving willful misconduct by the air carrier. *Berguido v. Eastern Air Lines, Inc.*, 317 F.2d 628, 629 (3d Cir.), *cert. denied*, 375 U.S. 895 (1963); *Grey v. American Airlines, Inc.*, 227 F.2d 282, 285 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956); *Domangue v. Eastern Air Lines, Inc.*, 531 F.Supp. 334, 341 n. 51 (E.D.La. 1981); Speiser and Krause § 11.37 at 772.

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The term *"dol"* has no precise common law analogue. It does seem evident, however, that the term "willful misconduct" expressed the intent of the drafters of the Convention at the time, any doubts about the precise terminology notwithstanding. *See Minutes* at 59 (Sir Alfred Dennis, leader of the British delegation, stated that "[w]e have at home the expression 'willful misconduct'; I believe that it covers all that which you mean; it covers not only deliberate acts but also careless acts done without regard for the consequences."); Miller at 80 ("[i]n an English court, air carriers would be subjected to unlimited liability in cases of wilful misconduct, and, in civil law courts, there would be unlimited liability in cases of *dol*"). American courts have relied upon the term "willful misconduct" as the correct manifestation of the drafters' intent. *See, e.g., Butler v. Aeromexico*, 774 F.2d 429, 430 (11th Cir. 1985); *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines Holland v. Tuller*, 292 F.2d 775 (D.C.Cir.), *cert. denied*, 368 U.S. 921 (1961); *Pekelis v. Transcontinental & Western Air, Inc.*, 187 F.2d 122, 125 n. 2 (2d Cir.), *cert. denied*, 341 U.S. 951 (1951); *American Airlines, Inc. v. Ulen*, 186 F.2d 529, 533 (D.C.Cir. 1949) (Minutes of the Convention "show little more than that the delegates were at the time in disagreement as to what terms would express their intent when translated into various languages").

VII. AMENDMENT OF COMPLAINTS

Plaintiffs in two of the twenty-five cases before us on appeal, Sandy Dix and Gary Dix (case number 84-0030) and Salim Khoury and Deborah Khoury (case number 84-1703), sought leave to amend their complaints to allege physical injury resulting from the events on Flight 855. The district court denied their motions to amend. We hold that the trial court abused its discretion in refusing to allow these plaintiffs to amend their complaints to allege physical injury.

In denying these plaintiffs' motions to amend, the district court stated that "the question of whether any of the Plaintiffs have sustained physical injuries has been an issue in this case for over a year." Order Denying Motion for Reconsideration 4 (April 28, 1986) (R 3-125:4). Although they did not seek to formally amend their complaints until after the district court's dismissal of their initial complaints, the Dix and Khoury plaintiffs had offered to amend their complaints as early as June, 1985, in a memorandum filed in opposition to Eastern's motion to dismiss. The mere passage of time, without anything more, is an insufficient reason to deny leave to amend. *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594, 597-98 (5th Cir. 1981). *See Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227 (1962). Here, the plaintiff's offer to amend was made in response to the defendant's initial challenge to the sufficiency of the complaint. Any delays thereafter were due to scheduling delays, not to any dilatory actions by the plaintiffs who sought leave to amend. Eastern did not allege any prejudice due to this alleged delay; in fact, it apparently consented to amending the complaints to show physical injury.[45] Because

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[45] At a January 21, 1986 hearing on the motions to dismiss, counsel for Eastern stated that "[t]here are some cases which I think haven't been pled, and there are cases which certainly you could give them the opportunity to amend a subsequent physical sequellae." SR 1:26. The trial

(Footnote continued on next page)

we have held that physical injury is not necessary to state a claim under the Warsaw Convention, a lack of physical injuries is not fatal to these plaintiffs' complaints. Nevertheless, a showing of physical injury may affect the plaintiffs' recoverable damages, and we therefore reverse the district court's denial of their motion to amend.

For these reasons, we hold that the trial court abused its discretion in refusing to allow the Dix and Khoury plaintiffs leave to amend their complaints to allege physical injury.

VIII. CONCLUSION

In conclusion, we currently are bound by the Florida decision that the plaintiff passengers on Eastern Flight 855 have stated a cause of action for intentional infliction of emotional distress under Florida law. Final resolution of that issue must await the Supreme Court of Florida's decision on the issue. We hold that the plaintiffs' allegations of emotional injury are sufficient to state a cause of action under the Warsaw Convention. We also hold that this Warsaw Convention cause of action preempts those aspects of the state law cause of action which conflict with the Convention, including plaintiffs' claim for punitive damages. In addition, plaintiffs allegations of willful misconduct under Article 25 of the Warsaw Convention serve not as an independent basis for relief, but only to remove the liability limitations of the Convention if willful misconduct can be demonstrated. Whether Eastern's actions in this case constituted willful misconduct is for the district court to determine on remand. Finally, we reverse the district court's denial of leave to amend the Dix and Khoury complaints.

REVERSED and REMANDED.

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court construed this concession to amendment "to extend only to those complaints wherein there appeared an allegation of some type of physical injury." R 3-125:4.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MDL 575 ALL CASES (DAVIS)

IN RE: EASTERN AIRLINES, INC., ENGINE FAILURE, MIAMI INTERNATIONAL AIRPORT ON MAY 5, 1983.

ORDER DISMISSING COMPLAINTS
WITH PREJUDICE*
(February 3, 1986)

THIS MATTER is before the Court on Defendant EASTERN AIRLINES, INC.'s, Motion for Judgment on the Pleadings. On January 21, 1986, a hearing was held on Defendant's Motion. After review of the memoranda submitted in support of and in opposition to this motion, and upon consideration of the arguments presented at the hearing on this motion, it is

ORDERED AND ADJUDGED that the Complaints filed in this case are DISMISSED with prejudice. The parties are directed to the "DISPOSITION OF THE COMPLAINTS" section, captioned below, for the precise disposition of each Complaint.

DISCUSSION

This action arose on or about May 5, 1983, out of Eastern Airline's Flight No. 855, bound for Nassau, Bahamas, from Miami International Airport, Miami, Florida. Shortly after take-off, one of the aircraft's engines failed, and the plane turned around for return and landing in Miami. After turning around, the aircraft's other two engines failed.

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*All MDL 575 cases are hereby dismissed with prejudice, with the exception of Case NO. 84-1259-CIV-GONZALEZ. *See* "Disposition of Complaints" Section, *infra* at 15-21.

The crew and passengers prepared for ditching of the aircraft as it lost altitude due to the engine failure. After a period of flight without any engines, the crew was able to restart one engine, under whose sole power the plane landed at Miami International Airport.

Each of the Complaints filed in this case contains four basic counts: one in contract, two in tort, and one under the Warsaw Convention. Defendant EASTERN AIRLINES, INC., has filed a Motion for Judgment on the Pleadings, asserting, *inter alia*, that nowhere in the Complaints are there allegations that Plaintiffs sustained physical injury, bodily injury, impact and/or direct physical contact during or resulting from the subject flight. Defendant argues the Complaints fail to state claims upon which relief can be granted.

This Order is directed to the sufficiency of the Plaintiffs' allegations under state law, i.e., under Breach of Contract (Count I), Negligence (Count II), and entire Want of Care (Count III) theories,[1] and under federal law, pursuant to the Warsaw Convention (Count IV).

COUNT I—EASTERN'S BREACH OF CONTRACT TO USE THE HIGHEST DEGREE OF CARE

Plaintiffs contend that the state claim aspects of this case are governed by *Kirksey v. Jernigan*, 45 So.2d 188 (Fla. 1950). The Court finds that *Kirksey* does not support

[1]Although the Plaintiffs claim it "is hardly axiomatic that Florida law will be applicable," *see* Plaintiffs' Memorandum Opposing Defendant's Motion for Judgment on the Pleadings at 2 n.3, both Plaintiffs and Defendant argued the sufficiency of the state law claims as governed by the law of Florida. Under both conflicts of law principles and the *Erie* doctrine, this Court concludes that the substantive law of Florida governs the state law claims. *See Klaxon v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 61 S.Ct. 1020 (1941); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938); *Griffith v. United Airlines*, 416 Pa. 1, 203 A.2d 796 (1964). *Bishop v. Florida Specialty Paint Co*, 389 So.2d 999 (Fla. 1980).

Plaintiffs' claims for breach of contract. In *Kirksey*, the Florida Supreme Court reaffirmed the long-standing Florida rule that "there can be no recovery for mental pain and anguish unconnected with physical injury in an action arising out of the negligent breach of a contract whereby simple negligence is involved." *Id.* at 189. *Kirksey* has been interpreted to mean that there can be no recovery for mental distress caused by a breach of contract in the absence of an independent willful tort. *Crenshaw v. Sarasota County Public Hospital Board*, 10 F.L.W. 880, 881 (Fla. 2d DCA April 3, 1985); *Gellert v. Eastern Airlines, Inc.*, 370 So.2d 802 (Fla. 3d DCA 1979), *cert. denied*, 381 So. 29 766 (Fla. 1980); *Ford v. Royal's, Inc.*, 537 F.Supp. 1173, 1175 (S.D.Fla. 1982).

Consequently, in the instant suit, the sufficiency of Plaintiffs' allegations under Counts II and III, the tort counts, is determinative of the viability of Plaintiffs' cause of action in contract. Because this Court concludes, as discussed below, that the Complaints fail to adequately allege an independent willful tort, there can be no recovery under Count I for mental anguish arising out of a breach of contract.

COUNT II—EASTERN'S NEGLIGENCE

Count II seeks recovery for simple negligence. Under Florida law "there is no cause of action for psychological trauma alone when resulting from simple negligence." *Brown v. Cadillac Motor Car Division*, 10 F.L.W. 156 (Fla. March 8, 1985). *See also Champion v. Gray*, 10 F.L.W. 164 (Fla. March 8, 1985). Recovery for emotional distress caused by simple negligence, as alleged in Count II, is therefore precluded absent allegations of discernible and demonstrable physical injury. *Brown*, 10 F.L.W. at 156 (holding that, in cases where a person suffers no physical injuries in an accident the "psychological trauma must cause a demonstrable physical injury such as death, paralysis,

muscular impairment, or similar objectively discernible physical impairment before a cause of action may exist").

Plaintiffs argue that *Brown* and *Champion* are not controlling because this suit involves emotional distress caused by fear for one's own safety, and not distress caused to a bystander out of fear for another's safety. While it is true that "personal" and "bystander" distress constitute two distinct emotional circumstances, *see Champion v. Gray*, 10 F.L.W. 164, 165 (Fla. March 8, 1985), recognition of this distinction offers no relief to the Plaintiffs in the case *sub judice*.

In *Brown* and *Champion* the impact rule was modified to allow recovery for damages flowing from discernible physical injury caused by psychic trauma resulting from negligent injury to another. If, as Plaintiffs argue, these "bystander" cases leave undisturbed prior Florida law regarding recovery for emotional distress caused by fear for one's own safety, then Plaintiffs' claim for negligence must fail, for the "impact rule" would bar recovery. Alternatively, if this Court were to fashion a "new" rule, regarding recovery for mental distress caused by fear for one's own safety, as opposed to fear for another's safety, it would nonetheless decline to allow recovery for psychic trauma alone. *Cf. Champion*, 10 F.L.W. at 165 ("the public policy of this state is to compensate for physical injuries . . . we are willing to modify the impact rule, but are unwilling to expand it to purely subjective and speculative damages for psychic trauma").

Absent allegations of impact and/or direct physical contact resulting from Defendant's alleged negligence, this Court concludes that there can be no recovery for emotional distress caused by simple negligence, unless Plaintiffs can

establish discernible *physical* consequences resulting from the distress.[3]

COUNT III—EASTERN'S ENTIRE WANT OF CARE

In *Kirksey v. Jernigan*, 45 So.2d 188, 189 (Fla. 1950), the Florida Supreme Court stated:

> We do not feel constrained to extend [the rule barring recovery for mental pain and anguish unconnected with physical injury] to cases founded purely in tort, where the wrongful act is such as to reasonably imply malice, or where, from the entire want of care of attention to duty, or great indifference to the persons, property, or rights of others, such malice will be imputed as would justify the assessment of exemplary or punitive damages.

In the previously-cited case of *Brown v. Cadillac Motor Car Division*, 10 F.L.W. 164 (Fla. March 8, 1985), a negligence case, the Florida Supreme Court noted that its "ruling does not disturb any prior decisions allowing [damages for psychological trauma] in intentional tort cases." *Brown*, 10 F.L.W. at 164 n.*. Plaintiffs, therefore, argue that Count III, entitled "Entire Want of Care", states a cause of action under *Kirksey*. Defendant counters that *Kirksey* did not establish an independent cause of action for "entire want of care." Upon review of the relevant case law, this Court concludes, as Defendant contends, that *Kirksey* did not establish an independent cause of action in tort.

When *Kirksey* was decided, Florida had not yet recognized an independent cause of action for intentional infliction of emotional distress. Generally, recovery for

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[3]This Court concludes, consistent with the Florida Supreme Court's ruling in *Kirksey*, that simple negligence, even if it did exist, could not serve as the basis for recovery under Count I for emotional distress arising out of a breach of contract. *Kirksey v. Jernigan*, 45 So.2d 188, 189 (Fla. 1950). *See also Crenshaw v. Sarasota County Public Hospital Board*, 10 F.L.W. 880 (Fla. 2d DCA April 13, 1985).

emotional distress alone was barred. In *Kirksey*, however, the Florida Supreme Court recognized for the first time, not a new tort, but, that damages for emotional distress alone could be recovered if the defendant was guilty of another recognized intentional tort.[3] Later Florida Supreme Court opinions support this interpretation of *Kirksey*. *See e.g.*, *Slocum v. Food Fair Stores of Florida*, 100 So.2d 396 (Fla. 1958). In *Slocum*, the Supreme Court of Florida stated that the *Kirksey* decision "would apparently allow recovery for mental suffering, even absent physical consequences, inflicted in the course of *other* intentional or malicious torts. . . ." *Id.* at 395 (emphasis added).

This Court concludes that Count III can withstand a motion to dismiss for failure to state a cause of action only if facts are alleged which, assuming their truth, would put the Defendant on notice of an independently recognized intentional tort.

In *Metropolitan Life Insurance Company v. McCarson*, 10 F.L.W. 154 (Fla. March 7, 1985), the Florida Supreme Court recognized for the first time the tort of intentional infliction of emotional distress. Section 46 of the Restatement (Second) of Torts (1965) has been adopted in Florida as the appropriate definition of the tort. *Id.* Section 46 defines the tort of intentional infliction of mental distress as follows:

> § 46. Outrageous Conduct Causing Severe Emotional Distress
>
> . . . One who by extreme and outrageous conduct intentionaly or recklesaly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

[3]In *Kirksey*, the court permitted damages for mental pain and anguish, finding that the defendant was guilty of the separate tortious act of "tortious interference with rights involving dead human bodies. . . ." *Kirksey v. Jernigan*, 45 So.2d at 189.

Restatement (Second) of Torts, § 46 (1965). To state a cause of action under this definition, it is necessary that Plaintiffs allege conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." *Metropolitan Life Insurance Co.*, 10 F.L.W. at 155.

"It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." Restatement (Second) of Torts, § 46, comment h (1965). In the instant suit, Count III realleges the previous counts for breach of contract and negligence and alleges that EASTERN acted with an "entire want of care" or that the subject incident was caused by the "outrageous and willful misconduct" of EASTERN. The facts alleged in support of these claims include EASTERN's alleged failure to properly inspect, maintain, and operate its aircraft. More particularly, it is alleged that EASTERN's records reveal at least one dozen prior instances of engine failure due to missing "O-rings", yet, EASTERN failed to cure the problem.

This last allegation is, perhaps, the Plaintiffs' strongest attempt to allege some type of scienter on the part of EASTERN. The Court finds, however, that the allegations contained in the Complaints, assuming their truth, do not support the contention that EASTERN AIRLINES acted "intentionally or recklesaly" as requried to state a cause of action for intentional infliction of emotional distress. There are no facts alleged to support the claim that EASTERN is guilty of "outrageous and willful misconduct."

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has

> been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Restatement (Second) of Torts, § 46, Comment d (1965) (*cited in Metropolitan Life Insurance Company v. McCarson*, 10 F.L.W. 154, 155 (Fla. March 7, 1985).

This Court concludes that Plaintiffs have failed to state a cause of action under Count III, the intentional tort count.

COUNT IV—WARSAW CLAIM

Article 17 of the Warsaw Convention,[4] which establishes the liability of international air carriers for harm to passengers, provides as follows:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

In *Air France v. Saks*, ____ U.S. ____, 105 S.Ct. 1338 (1985), the Supreme Court held that liability under Article 17 of the Warsaw Convention arises "only if a passenger's

[4]Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1979, 49 Stat. 3000, T.S. No. 876 (1934), note following 49 U.S.C. App. §1502.

injury is caused by an unexpected or unusual event or happening that is external to the passenger." 105 S.Ct. at 1345.[5]

The Defendant does not contend that the engine failure and subsequent preparations for ditching of the aircraft did not constitute an accident within the meaning of Article 17. Clearly, those events were not the normal and expected operations of the aircraft. *See, e.g. Weintraub v. Capital International Airways, Inc.*, 16 CCH Av. Cas. 18,058 (N.Y.Sup.Ct., 1st Dept. 1981) (testimony that "sudden dive" led to pressure change causing plaintiff's hearing loss indicates injury was caused by an "accident"), cited in *Air France v. Saks*, 105 S.Ct. at 1345-46. Rather, the Defendant objects to application of the Warsaw Convention because, assuming the existence of an accident, the Plaintiffs have not alleged injuries which are cognizable under Article 17.

The operative language of Article 17 provides recovery for damages "sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger." Defendant contends that this language refers only to physical injuries. Plaintiffs respond that no such limitation is implied.

Among the cases relied on by Plaintiffs is *Krystal v. British Overseas Airways Corp.*, 403 F.Supp. 1322 (C.D.Cal. 1975). In *Krystal*, airline passengers brought suit against the airline under the Warsaw Convention for physical and psychological injuries incurred when an airplane was hijacked. *Id.* One of the plaintiff's demands for recovery was

[5]When injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, the injury has not been caused by an "accident" within the meaning of Article 17 of the Warsaw Convention. *Air France v. Saks*, ____ U.S. ____, 105 S.Ct. at 1346. Thus, in *Saks*, the Court held that the plaintiff's hearing loss, which was caused by the normal operation of the aircraft's pressurization system, was not compensable under the Warsaw Convention. *Id.*

based solely on mental distress, which included fright, anxiety, stress, loss of sleep, and fear. *Id.* at 1322-23. The court ruled that mental injuries, standing alone, are compensable under the Warsaw Convention. *Id.* at 1324. In reaching this conclusion, the court quoted extensively from *Husserl v. Swiss Air Transport Co.*, 388 F.Supp.1238 (S.D.N.Y 1975), reasoning that "[t]o effect the treaty's avowed purpose, the types of injuries enumerated should be construed expansively to encompass as many types of injury as are colorably within the ambit of the enumerated types. Mental and psychosomatic injuries are colorably within the ambit and are, therefore, comprehended by Article 17." *Id.* at 1323-24 (quoting *Husserl*, 388 F.Supp. at 1250).

Indisputably, that portion of the *Krystal* decision which concludes that a hijacking is an accident within the meaning of Article 17, *see Krystal*, 403 F.Supp. at 1323, remains valid in light of *Saks*. In fact, *Krystal* is cited with approval by the Supreme Court in *Saks* for the proposition that the definition of "accident" under Article 17 should be flexibly applied. *Air France v. Saks*, 105 S.Ct. at 1345. Whether the phrase "bodily injury" should, similarly, be given an expansive construction was not addressed by the Supreme Court. However, the Court did provide some guidance on how this issue is to be resolved.

In *Saks*, the Supreme Court set forth an approach to be utilized in determining the meaning of terms contained in the Warsaw Convention. *Id.* at 1342. Upon application of this approach, this Court concludes, as discussed below, that mental anguish, alone, is not encompassed within the meaning of "bodily injury" under the Warsaw Convention.

French was the sole official language of the Warsaw Convention. Accordingly, in *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905, 88 S.Ct. 2053 (1968), the Fifth Circuit held that the binding meaning of the terms of the Warsaw Convention is

the French legal meaning of those terms.[6] The Supreme Court in *Saks* reaffirmed this method of analysis. *Air France v. Saks*, 105 S.Ct. at 1342 (citing with approval *Block*). Thus, doubt is cast upon *Krystal*, and other cases following the district court decision in *Husserl*, since the *Husserl* court expressly declined to view as binding the French legal meaning or interpretation of the treaty. *Husserl v. Swiss Air Transportation Company, Ltd.*, 388 F.Supp. at 1249.[7]

It is this Court's responsibilty to give the specific words of the Warsaw Convention a meaning consistent with the shared expectations of the signatories of the treaty. *Air France v. Saks*, 105S.Ct. at 134. Thus, as the Supreme Court has instructed, "[w]e look to French legal meaning for guidance as to these expectations. . . ." *Id.*

The French text of the relevant part of Article 17, relating to injury, reads: "Le transporteur est responsable du dommage survenu en cas de *mort*, de *blessure ou de toute autre lésion corporelle* subie par un voyageur. . . ." Quoted in *Air France v. Saks*, 105 S.Ct. at 1338 n.2 (emphasis added).

The official American translation of the above-quoted portion of Article 17 reads: "The carrier shall be liable for damage sustained in the event of the *death* or *wounding* of a passenger *or any other bodily injury* suffered by a passenger. . . ." 49 Stat. 3000 (emphasis added).

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[6]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

[7]Judge Tyler, speaking for the court in *Husserl*, stated: "It is true that this country adhered to the French text of the Convention, as did all of the signatories . . . but, as I now view the matter, that fact does not mean that the French legal meaning of the words or the French legal interpretation of the treaty is binding." 388 F.Supp. at 1249.

As stated in *Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152, 1156 (D.N.M. 1973), the controlling phrase would seem to be "ou de toute autre lésion corporelle" (or any other bodily injury), for both the terms "mort" (death) and "blessure" (wound) are by necessity incorporated within it. "Lésion corporelle" (bodily injury) has been defined to mean "an infringement of physical integrity (l'atteinte à l'integrité physique)." *Id.* (quoting Henry P. de Vries translation). The *Burnett* court observed, as does this Court, that the definition does not indicate that mental injuries are to be included within its domain. *Id.*[8]

"In interpreting a treaty it is proper, of course, to refer to the records of its drafting and negotiations." *Air France v. Saks*, 105 S.Ct. at 1343 (citing *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431, 63 S.Ct. 672, 677 (1943)). After reviewing the legislative history and initial drafts of the Warsaw Convention, the court in *Burnett* concluded that "the inference is strong that the Convention intended to narrow the otherwise broad scope of liablity under the former draft and preclude recovery for mental anguish alone." *Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. at 1157. Because the *Burnett* court utilized an approach which was later declared by the Supreme Court in *Saks* to be the proper method of analysis, this Court finds the *Burnett* opinion to be well-reasoned, persuasive authority for the proposition that mental anguish alone is not encompassed

[8]The *Burnett* court also rejected the contention that "blessure" (wound) encompasses mental anguish. 368 F.Supp. at 1156. The court reasoned: "The critical words of Article 17, 'mort, de blessure, and ou de toute autre lesion corporelle' must be examined together in order to ascertain their contextual meaning. Although the *French-English Dictionary of Legal Terms* by Jules Jeraute defines "blessure" to include not only a wound but also hurt or injury, when the term is modified by the subsequent phrase of the provision, it seems apparent that the drafters utilized the word in solely a physical sense." *Id.*

within the French legal meaning of bodily injury.[9] This Court concludes, therefore, that mental anguish alone is not compensable under the Warsaw Convention.

DISPOSITION OF COMPLAINTS

A. *Cases Removed Pursuant to the Federal Courts' Treaty Jurisdiction.*

Many of the suits filed in this case were removed pursuant to the federal courts' treaty jurisdiction. 28 U.S.C. §1331. Absent an allegation of physical injury, the Complaints in this case do not state a cause of action under the Warsaw Convention. Since the Warsaw Convention claim which was the basis for treaty jurisdiction is eliminated from the case, this Court has discretion to remand the remaining state claims. *In re Carter*, 618 F.2d 1093 (5th Cir. 1980), *cert. denied*, 450 U.S. 949, 101 S.Ct. 1410 (1981). The parties, however, indicated their preference at the January 21, 1986 hearing, for this Court to retain jurisdiction over the pendent state law claims. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130 (1966). This Court, therefore, will dispose of all claims raised. For the reasons set forth in the "Discussion" section, it is

ORDERED AND ADJUDGED that the following cases are DISMISSED with prejudice:

1. *Connie Gale and Michael Gale v. Eastern Air Lines*, Case No. 83-1950-CIV-DAVIS

[9]During the January 21, 1986 hearing, Plaintiff brought to this Court's attention the case of *Palagonia v. TransWorld Airlines*, 442 N.Y.S. 2d 670, 110 Misc. 2d 478 (N.Y. 1978), in which a state court held that the term "lesion corporelle" as used in the Warsaw Convention includes the concept of mental injury, even in the absence of concomitant physical manifestation. *Palagonia*, 442 N.Y.S. 2d at 671. Although the state court in *Palagonia* looked to the French text of the Warsaw convention, this Court is unpersuaded that the result reached by the *Palagonia* court is correct. Instead, as expressed in the above text, the Court concurs with the federal district court's decision in *Burnett*, 368 F.Supp. at 1157.

2. *Michael Gale and Connie Gale v. Eastern Air Lines*, Case No. 83-1951-CIV-ARONOVITZ

3. *Rose Marie Floyd and Terry Floyd v. Eastern Air Lines*, Case No. 83-1949-CIV-NESBITT

4. *Terry Floyd and Rose Marie Floyd v. Eastern Air Lines*, Case No. 84-1700-CIV-HASTINGS

5. *Gloria Patterson and Edmund Patterson v. Eastern Air Lines*, Case No. 83-2193-CIV-KING

6. *Robert Scharhag v. Eastern Air Lines*, Case No. 83-3014-CIV-HOEVELER

7. *Thomas J. Nolan v. Eastern Air Lines*, Case No. 83-3013-CIV-ARONOVITZ

8. *Eugene H. Champ v. Eastern Air Lines*, Case No. 83-3016-CIV-DAVIS

9. *Frederick W. Hoehler v. Eastern Air Lines*, Case No. 83-3017-CIV-NESBITT

10. *Sally Ann Collins v. Eastern Air Lines*, Case No. 83-3078-CIV-ARONOVITZ

11. *Michael R. Dramis v. Eastern Air Lines*, Case No. 83-3079-CIV-HASTINGS

12. *Gary Dix and Sandy Dix v. Eastern Air Lines*, Case No. 84-1701-CIV-DAVIS

13. *Alexander Dix v. Eastern Air Lines*, Case No. 84-0033-CIV-DAVIS

14. *Sandy Dix and Gary Dix v. Eastern Air Lines*, Case No. 84-0030-CIV-DAVIS

15. *Dana Dix v. Eastern Air Lines*, Case No. 84-0032-CIV-SPELLMAN

16. *Bruce Jacobs and Janet Jacobs v. Eastern Air Lines*, Case No. 84-0924-CIV-DAVIS

17. *Janet Jacobs and Bruce Jacobs v. Eastern Air Lines*, Case No. 84-0920-CIV-ATKINS

18. *Alexander Embry v. Eastern Air Lines*, Case No. 84-0922-CIV-PAINE

19. *Salim Khoury and Deborah Khoury v. Eastern Air Lines*, Case No. 84-1703-CIV-ATKINS

20. *Myriam Carrasco v. Eastern Air Lines*, Case No. 84-1258-CIV-DAVIS

21. *Gregory Mantz, Netta Mantz and Harold Mantz v. Eastern Air Lines*, Case No. 85-0654-CIV-NESBITT

22. *Netta Mantz, Harold Mantz and Gregory Mantz v. Eastern Air Lines*, Case No. 85-0653-CIV-HASTINGS

23. *Alfred Goldberg and Shirley Goldberg v. Eastern*, Case No. 84-1956-CIV-DAVIS

24. *Salim Khoury and Deborah Khoury, his wife v. Eastern*, Case No. 84-0923-CIV-KEHOE

B. *Cases Removed Pursuant to the Federal Courts' Diversity Jurisdiction.*

The following two cases were removed from the Court of Pleas of Allegheny County, Pennsylvania to the United States District Court for the Western District of Pennsylvania pursuant to the federal courts' diversity jurisdiction; the cases were then transferred to this Court as ordered by the Judicial Panel on Multidistrict Litigation:

1. *Gerry Ash Seif v. Eastern Air Lines*, Case No. 84-0835-CIV-HASTINGS

2. *Susan Rooney and William Rooney*, Case No. 84-0836-CIV-DAVIS

For the reasons set forth below, it is hereby

ORDERED AND ADJUDGED that the above two enumerated actions are DISMISSED with prejudice.

The above two actions were transferred to this court pursuant to 28 U.S.C. § 1407. In cases of multidistrict litigation transfers, the transferee court ordinarily will apply the substantive law of the transferor forum, including that forum's choice of law rules. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts,* 78 F.R.D. 575, 584 (1977). *See also* Manual for Complex Litigation, Second, §33.23. Thus, this Court, sitting as a transferee court, is obligated to apply the state law that would have been applied by the United States District Court for the Western District of Pennsylvania, the transferor court, had a transfer not occurred.

A federal district court's choice-of-law decision is governed by the choice-of-law rules of the forum state. *Klaxon v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 61 S.Ct. 1020 (1941). Accordingly, the United States District Court for the Western District of Pennsylvania, which was sitting in diversity, would have been obligated to follow Pennsylvania's choice-of-law rules.

> In *Griffith v. United Air Lines,* 416 Pa. 1, 203 A.2d 796 (1964), the Pennsylvania Supreme Court adopted a flexible choice-of-law rule which permits an "analysis of the policies and interests underlying the particular issue before the court" and a determination of which jurisdiction is most intimately concerned with the outcome of the litigation. *Id.* at 21, 22 203 A.2d 796.

American Contract Bridge League v. Nationwide Mutual Fire Insurance Co., 752 F.2d 71, 74 (3d Cir. 1985).

Pennsylvania's "policy, interests, and contacts test," *Id.* at 75, requires application of the substantive law of Florida to the present controversy. In support of this conclusion, the Court notes that the vast majority of the plaintiffs who have

filed suit in this multidistrict action purchased or caused to be purchased their tickets for Eastern Flight No. 855 from Miami International Airport located in Dade County, Florida. The subject flight departed from Miami International Airport. After the engine trouble occurred, apparently somewhere between Miami and the Bahamas, the subject aircraft turned around and landed in Miami, Florida. In sum, Florida appears to be the state with the most significant interests and involvement with the subject litigation.

The sufficiency of the complaints will, therefore, be determined by Florida law. For the reasons set forth above in the "Discussion" section of this Order, this Court concludes that the *Seif* and *Rooney* complaints have failed to state claims upon which relief may be granted. Both complaints contain no factual allegations of a cognizable physical injury, nor do they contain sufficient factual allegations of intentional or reckless misconduct. Dismissal is, therefore, appropriate.

C. *Cases Alleging Physical Impact and/or Injury.*

The following two cases, both removed to this Court pursuant to the federal courts' treaty jurisdiction, contain allegations of physical impact and/or injury:

1. *Manuel Crespo and Norma Crespo v. Eastern Air Lines, Inc.*, Case No. 84-0502-CIV-DAVIS

2. *Kevin King, Ben King, and Mary Jo King v. Eastern Air Lines, Inc.*, Case No. 84-1259-CIV-GONZALEZ

It is hereby

ORDERED AND ADJUDGED that Case No. 84-0502-CIV-DAVIS, *Manuel Crespo and Norma Crespo v. Eastern Airlines, Inc.*, is DISMISSED with prejudice. As set forth in the "Discussion" section of this Order, absent a sufficient factual allegation of physical injury, the Plaintiffs have

stated no cause of action. Here, Plaintiffs asserted in their original Complaint that they suffered "physical impact and injury, severe and permanent mental pain and anguish, fright, distress and an inability to lead a normal life." A careful reading of the Complaint, however, reveals no factual allegations in support of the claim of physical impact or injury. While it is true that Plaintiffs need not plead each and every element to state a cause of action, it is necessary that Plaintiffs plead facts sufficient to put the Defendant on notice of the charges against which it must defend. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957). The Plaintiffs, here, have failed to sufficiently allege facts concerning the alleged physical impact or injury. The Complaint is, therefore, dismissed.

It is further

ORDERED AND ADJUDGED that Defendant's Motion for Judgment on the Pleadings is DENIED in Case No. 84-1259-CIV-GONZALEZ, *Kevin King, Ben King and Mary Jo King v. Eastern Air Lines, Inc.* In their original Complaint, Plaintiffs alleged that "[a]s a direct and proximate result of defendant, EASTERN AIRLINE INC.'s breach of contract, MARY JO KING's pregnancy was adversely affected and BEN KING was born prematurely. As a consequence of his premature birth, BEN KING was injured in and about his body and extremeties, suffered pain therefrom, suffered physical handicap disability and disfigurement and loss of enjoyment of a normal life." The Court finds that these factual allegations are sufficient to withstand a motion for judgment on the pleadings. The Defendant's motion is therefore denied in Case No. 84-1259-CIV-GONZALEZ. That case is hereby transferred back to the calendar of the Honorable Jose A. Gonzalez. All further documents filed in the *King* case are to bear the following number and initials: CASE NO. 84-1259-CIV-GONZALEZ.

DONE AND ORDERED in Chambers at Miami, Florida this 3rd day of February, 1986.

/s/ Edward B. Davis

EDWARD B. DAVIS
United States District Judge

APPENDIX C

SUPREME COURT OF FLORIDA

No. 73,395

EASTERN AIRLINES, INC.,

Petitioner,

vs.

CHARLES KING,

Respondent.

[February 15, 1990]

GRIMES, J.

We review *King v. Eastern Airlines, Inc.*, 536 So.2d 1023 (Fla. 3d DCA 1987), in which the Third District Court of Appeal partially reversed a judgment on the pleadings, Our jurisdiction is based on conflict with *Metropolitan Life Insurance Co. v. McCarson*, 467 So.2d 277 (Fla. 1985), and *Brown v. Cadillac Motor Car Division*, 468 So.2d 903 (Fla. 1985). Art. V, § 3(b)(3), Fla. Const.

The facts as alleged in the complaint were as follows. On May 5, 1983, the respondent, Charles King, was a passenger on Eastern Airlines' Flight #855 departing from Miami International Airport, bound for Nassau, Bahamas. En route one of the plane's three engines failed, so the flight crew turned the plane around to return to Miami. After turning around, the plane's other two engines failed. The crew and passengers were prepared to ditch the plane as it lost altitude. Finally, after an extended period, the crew was able to restart one engine and land the plane at Miami International Airport.

King sued Eastern Airlines for, *inter alia*, damages allegedly incurred as a result of Eastern's reckless or intentional infliction of mental distress and for damages arising under the Warsaw Convention.[1] Specifically, count III of King's amended complaint alleged that Eastern failed to properly inspect, maintain, and operate its aircraft and that "Eastern's records reveal at least one dozen prior instances of engine failures due to missing O-rings [oil seals], and yet Eastern failed to institute appropriate procedures to cure this maintenance problem despite such knowledge." King further alleged that this constitutes an "entire want of care" and "indifference" and implies "such wantonness, willfulness, and malice as would justify punitive damages." In count IV, King claimed damages under the Warsaw Convention by reason of this negligent or willful misconduct.

The circuit court stayed action in this lawsuit pending the outcome of related federal actions filed by other passengers in the United States District Court for the Southern District of Florida. The district court entered judgments on the pleadings in Eastern's favor based on the failure to state a cause of action. *In re Eastern Airlines, Inc. Engine Failure, Miami Int'l Airport on May 5, 1983*, 629 F.Supp. 307 (S.D. Fla. 1986). Persuaded by the federal district court's reasoning, the state circuit court then entered a judgment on the pleadings in favor of Eastern and against King. On appeal a panel of the Third District Court of Appeal reversed and reinstated the claim for intentional infliction of mental distress but affirmed the dismissal of the claim for emotional distress under the Warsaw Convention. *King v. Eastern Airlines, Inc.*, 536 So.2d 1023 (Fla. 3d DCA 1987). On motion for rehearing, the court again affirmed the dismissal of the Warsaw Convention claim but held that the

[1]Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, adhered to by the United States June 27, 1934, 49 Stat. 3000, 3014, reprinted in 49 U.S.C. note following § 1502.

unavailability of a cause of action under the Warsaw Convention did not preclude other forms of relief. *Id.* at 1030, 1032. Thereafter, in a split vote on rehearing en banc, the court adhered to the decision but announced different reasons for reversing the dismissal of the state claim for emotional distress. *Id.* at 1032.

The related cases in federal court were appealed to the Eleventh Circuit Court of Appeals. That court relied on the Third District's decision in *King* to uphold the state claim for mental distress but noted that the issue was pending in this Court. *Floyd v. Eastern Airlines, Inc.*, 872 F. 2d 1462, 1467 (11th Cir. 1989). The Eleventh Circuit Court of Appeals then concluded that the Warsaw Convention does allow recovery for purely mental injuries unaccompanied by physical trauma. *Id.* at 1480. Further, the court ruled that to the extent that the cause of action for intentional infliction of emotional distress under Florida law conflicts with the cause of action under the Warsaw Convention, Florida law was preempted. *Id.* at 1482.

This Court first recognized the tort of intentional infliction of emotional distress in *Metropolitan Life Insurance Co. v. McCarson*. In *McCarson* we approved the adoption of section 46, Restatement (Second) of Torts (1965), which states:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

In that case, however, we held that the court below had not conformed its findings to the comments to section 46 which explain the application of the tort.

Comments d and i to section 46 are particularly pertinent to our consideration:

It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

. . . .

i. *Intention and recklessness.* The rule stated in this Section applies where the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct. It applies also where he acts reckless, as that term is defined in § 500, in deliberate disregard of a high degree of probability that the emotional distress will follow.

Section 500, Restatement (Second) of Torts (1965), provides:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Comment b of section 500 further elaborates that "[c]onduct cannot be in reckless disregard of the safety of others unless the act or omission is itself intended . . . ."

Applying these principles to the present case, it is clear that King has failed to state a claim for reckless or intentional infliction of emotional distress. The allegations that Eastern failed to properly inspect, maintain, and operate its aircraft rise no higher than negligence. The fact that there may have been at least one dozen prior instances of missing O-rings causing engine failures does not reflect "extreme and outrageous conduct intentionally or recklessly" causing emotional distress. The balance of count III contains only conclusions. *See Price v. Morgan*, 436 So.2d 1116 (Fla. 5th DCA 1983) (a pleading is insufficient if it contains merely conclusions as opposed to ultimate facts supporting each element of the cause of action).

As *amicus* points out, it is incongruous that Eastern would recklessly or intentionally place its passengers, crews, and multimillion dollar airplanes in such peril. Our conclusion is reinforced by King's allegation that, despite Eastern's knowledge of the prior engine failures, Eastern failed to take "appropriate" procedures to correct the problem. Failing to take "appropriate" action to correct the problems would appear to negate an intentional act or an intentional failure to act on Eastern's part. Significantly, King's complaint does not allege that Eastern knew or should have known that the procedures were inappropriate.

The majority opinion below represents a misapplication of the principle established in *Metropolitan Life Insurance Co. v. McCarson*. Furthermore, as noted by dissenting Judge Schwartz:

> In essence, the majority view amounts to establishing an exception to the recently reaffirmed "impact rule," *Brown v. Cadillac Motor Car Div.*, 468 So.2d 903 (Fla. 1985), which would arise in

every case in which the defendant acts recklessly. It would apply when, for example, a highly intoxicated driver recklessly operates his vehicle and narrowly misses but severely frightens a plaintiff, or when a plaintiff uses and becomes mentally concerned over some potential harm, but is not actually "impacted" or physically injured by a product—like a Mustang or a Dalkon Shield—which may have been recklessly manufactured. Whatever the law of Florida may previously have been, see *Crane v. Loftin*, 70 So.2d 574 (Fla. 1954) (dictum); *Kirksey v. Jernigan*, 45 So.2d 188 (Fla. 1950) (dictum), it is very clear that there is no such exception under the present law of our state.

536 So.2d at 1036-37 (Schwartz, J., dissenting).

While not the basis of our jurisdiction, we deem it appropriate to address the question of whether King has stated a cause of action under the Warsaw Convention. The Warsaw Convention is an international treaty to which the United States is a party. *Air France v. Saks*, 470 U.S. 392 (1985). The Convention applies "to all international transportation of persons, baggage, or goods performed by aircraft for hire." Warsaw Convention art. 1. The Convention creates a presumption that the carrier is liable for damage sustained by passengers as a result of the carrier's conduct, shifting the burden of proof to the carrier to show that it took all necessary measures, or that it was impossible to take such measures, to avoid the damage. Warsaw Convention art. 17, 20. The Convention originally placed a limit of $8,300 on the carrier's liability. Warsaw Convention art. 22. Under the Montreal Agreement of 1966,[3] which is not a treaty of the United States, the airlines agreed to raise the limit of liability to $75,000 and waive the

[3]Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, approved by CAB Order No. 28680, May 13, 1966, 31 Fed.Reg. 7302 (1966).

due care defenses of article 20 for flights originating, terminating, or having a stopping point in the United States. *Floyd*, 872 F.2d at 1468.

Article 17 of the Convention establishes the liability of international air carriers for injuries to passengers. The unofficial United States translation of article 17 states:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3014, reprinted at note following 49 U.S.C. § 1502. However, the French text of the Warsaw Convention is the only official text and the one officially adopted and ratified by the Senate. *See Floyd*, 872 F.2d at 1470. The United States Supreme Court has held that the French legal meaning controls "not because 'we are forever chained to French law' by the Convention, but because it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Saks*, 470 U.S. at 399 (citation omitted). The French text of article 17 reads:

> Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit â bord de l'aéronef au cours de toutes opérations d'embarquement et de débarquement.

Both parties conceded at oral argument that this case involved an "accident" occurring on board the aircraft. *See Saks*, 470 U.S. at 405 (accident defined as an "unexpected or unusual happening or event that is external to the passenger"). Therefore, the question we must address is

whether the use of the language of article 17 was meant to encompass purely emotional distress.

The courts have sharply split on this issue. Those which permit recovery include *Floyd*, 872 F.2d 1462; *Karfunkel v. Compagnie Nationale Air France*, 427 F. Supp. 971 (S.D.N.Y. 1977); *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322 (C.D. Cal. 1975); *Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238 (S.D.N.Y. 1975); *Palagonia v. Trans World Airlines, Inc.*, 110 Misc.2d 478, 442 N.Y.S. 2d 670, 672 (Sup. Ct. 1978). Other courts have determined that article 17 does not contemplate damages for emotional distress unaccompanied by physical trauma. *Burnett v. Trans World Airlines, Inc.*, 368 F. Supp. 1152 (D.N.M. 1973); *Rosman v. Trans World Airlines, Inc.*, 34 N.Y. 2d 385, 358 N.Y.S.2d 97 (1974).

After careful review and consideration, we are persuaded by the extensive and thorough resolution of this matter in *Floyd*. The *Floyd* court exhaustively examined the French legal meaning of the text, the concurrent and subsequent legislative history of the Warsaw Convention, the conduct of the parties, and the cases interpreting article 17.[3] The court determined that French civil law permits recovery for any damage, whether material or moral, including mental suffering unaccompanied by physical injury. *Id.* at 1472. We agree that the analysis of the cases which preclude recovery for emotional distress is flawed because those courts did not carefully consider the French legal meaning of *lesion corporelle* or the negotiating history of the Convention. *Id.* at 1476-78. In denying recovery, those courts have erroneously imposed upon article 17 the common law requirement that emotional injury must accompany physical injury in order to be compensable.

[3]The French words "lesion corporelle" are literally translated as "bodily injury."

Because we found that King failed to state a claim under state law it is unnecessary for us to discuss whether a state law claim for emotional distress would be preempted by the Warsaw Convention. However, we will address his claim for damages in excess of $75,000 under the Warsaw Convention. Article 25 of the Convention states:

> (1) The carrier shall not be liable to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be the equivalent to wilful misconduct.[4]

The Eleventh Circuit determined that article 25 did not provide a separate cause of action for punitive damages but instead served only to lift the strict limit on liability for compensatory damages in the case of wilful acts. *Floyd*, 872 F. 2d at 1485.

We have already determined that King's allegations are not sufficient to support a claim for reckless or intentional conduct. It follows that we must further hold that he has no basis to assert a claim alleging "wilful misconduct." We reach this conclusion whether we apply the federal interpretation of "wilful misconduct," *Butler v. Aeromexico*, 774 F.2d 429 (11th Cir. 1985), or the Florida standard for the recovery of punitive damages. *White Construction Co. v. DuPont*, 455 So.2d 1026 (Fla. 1984).

In conclusion, we disapprove the decision below with respect to both the state claim for emotional distress and that under the Warsaw Convention. We hold that King has failed to state a claim for emotional distress under Florida law. However, he does have a claim for emotional distress

[4]We use the English translation of this article since neither party has suggested an alternative French legal meaning. *See Floyd v. Eastern Airlines, Inc.*, 872 F. 2d 1462, 1462 n.34 (11th Cir. 1989).

under article 17 of the Warsaw Convention but any recovery is limited to a maximum of $75,000. Article 25 of the Convention does not apply because the complaint fails to state a claim for "wilful misconduct." We remand the case for further proceedings in accordance with this opinion.

It is so ordered.

OVERTON, SHAW and KOGAN, JJ., Concur

EHRLICH, C.J., Concurs specially with an opinion, in which SHAW and BARKETT, JJ., Concur

BARKETT, J., Concurs specially with an opinion

McDONALD, J., Concurs in part and dissents in part with an opinion

EHRLICH, C.J., specially concurring.

I concur in all aspects of the majority opinion except the majority's approval of the following language quoted from Judge Schwartz's dissent in the decision below

> "In essence, the majority view amounts to establishing an exception to the recently reaffirmed 'impact rule,' *Brown v. Cadillac Motor Car Div.*, 468 So.2d 903 (Fla. 1985), which would arise in every case in which the defendant acts recklessly. It would apply when, for example, a highly intoxicated driver recklessly operates his vehicle and narrowly misses but severely frightens a plaintiff, or when a plaintiff uses and becomes mentally concerned over some potential harm, but is not actually 'impacted' or physically injured by a product—like a Mustang or a Dalkon Shield—which may have been recklessly manufactured. Whatever the law of Florida may previously have been, see *Crane v. Loftin*, 70 So.2d 574 (Fla. 1954)

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

> (dictum); *Kirksey v. Jernigan*, 45 So.2d 188 (Fla. 1950) (dictum), it is very clear that there is no such exception under the present law of our state."

Slip op. at 5-6 (quoting 536 So.2d 1023, 1036-37 (Fla. 3d DCA 1987) (Schwartz, J., dissenting)). I write separately to point out the confusion or misunderstanding which I fear may be created by the quoted language. This quote should not be taken to mean that impact or a physical manifestation of psychological trauma is required in connection with the tort of intentional infliction of emotional distress.

This Court has long recognized the tort of negligent infliction of emotional distress where the distress is accompanied by physical impact. *See, e.g., Gilliam v. Stewart*, 291 So.2d 593 (Fla. 1974); *Clark v., Choctawhatchee Electric Co-Operative*, 107 So.2d 609 (Fla. 1958). More recently, in *Champion v. Gray*, 478 So.2d 17 (Fla. 1985), and *Brown v. Cadillac Motor Car Division*, 468 So.2d 903 (Fla. 1985), we modified, in some limited situations, the requirement of an impact in connection with a claim of negligent infliction of emotional distress. However, in those situations where impact is unnecessary, a clearly discernible physical impairment must accompany or occur within a short time after the negligently inflicted psychic injury. 468 So.2d at 904; 478 So.2d at 17.

As noted by the majority, this Court first recognized the tort of intentional infliction of emotional distress by adopting section 46, of the Restatement (Second) of Torts (1965), in *Metropolitan Life Insurance Co. v. McCarson*, 467 So.2d 277 (Fla. 1985). While there must be impact or an objectively discernible physical manifestation before a cause of action arising from simple negligence may exist, no requirement of impact or physical injury is contained in section 46. In fact, comment k of that section states that the rule

> is not . . . limited to cases where there has been bodily harm; and if the conduct is sufficiently extreme and outrageous there may be liability for the emotional distress alone, without such harm. In such cases the courts may perhaps tend to look for more in the way of outrage as a guarantee that the claim is genuine; but if the enormity of the outrage carries conviction that there has in fact been severe emotional distress, bodily harm is not required.

Where the psychic injury is based on simple negligence, proof of impact or objective physical manifestation affords a guarantee that the mental distress is genuine. Whereas, the clearly outrageous nature of the conduct necessary under section 46 serves as adequate assurance that the resulting mental disturbance is not fictitious. *See* W. Keeton, *Prosser and Keeton on Torts*, §§12 & 54 (5th ed. 1984). This distinction between causes of action based on negligent and intentional infliction of emotional distress was recognized by this Court in *Brown*. We noted that our holding in that case that there is no cause of action within this state for psychological trauma alone resulting from simple negligence was not intended to disturb prior decisions of the district courts allowing such damages in intentional tort actions based on outrageous conduct. 468 So.2d at 904 n.*.*

SHAW and BARKETT, JJ., Concur

BARKETT, J., specially concurring.

I concur in the Court's judgment that prior decisions would bar relief for the intentional infliction of mental distress in this case. I believe, however, that persons who have suffered great mental anguish through the extreme negligence of a tortfeasor, such as Eastern's in this case, should be permitted a remedy.

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*For this reason, I do not believe that this Court's decision in Brown v. Cadillac Motor Car Division, 468 So.2d 903 (Fla. 1985), is in conflict with the decision under review.

McDONALD, J. . concurring in part and dissenting in part.

I would hold that King has no cause of action against Eastern under Florida law or under the Warsaw Convention unless his mental anguish evolves into an objectively discernible bodily injury similar to that described in *Champion v. Gray*, 478 So.2d 17 (Fla. 1985), and *Brown v. Cadillac Motor Car Division*, 468 So.2d 903 (Fla. 1985).

In reaching this conclusion I am much more persuaded by *Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152 (D.N.M. 1973), than I am by *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462 (11th Cir. 1989), even though the latter discusses the former. *Burnett* aptly points to the difference between *lésion corporelle* and *lésion mentale*. As the court further reported in *Burnett*, the First International Conference on Private Air Law had been interpreted to allow mental distress in a myriad of circumstances. It then noted:

> [T]he Conference appointed a group of air law experts who would report to the Second International Conference in Warsaw in 1929. The text they submitted became the mode for present Article 17 and it provided in pertinent part:
>
> "Le transpoteur est responsable du dommage survenu pendant le transport:
>
> (a) en cas de mort, de blessure ou de toute autre lesion corporelle subie par un voyageur."

By thus restricting recovery to bodily injuries, the inference is strong that the Convention intended to narrow the otherwise broad scope of liability under the former draft and preclude recovery for mental anguish alone. Had the delegates desired otherwise, there would have been no reason to so substantially modify the proposed draft of the First Conference.

Concurring in this conclusion, Professor Juglart of the Law Faculty of the University of Paris has proffered the opinion that Article 17, as now constituted, does not permit recovery for mental injuries. He concludes that to so recover, the Article would have to undergo amendment to read "lesion corporelle ou mentale."

368 F.Supp. at 1157 (footnotes omitted).

It thus appears to me that some form of bodily injury must be the result of an airlines' wrong before there can be a recovery. I can not, and do not, equate mental stress to a bodily injury and do not believe it contemplated by the Warsaw Convention.

I concur with the majority opinion in reference to the discussion of Florida law, but dissent on the effect of the Warsaw Convention treaty.

APPENDIX D

[FILED JAN 11 1990]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5381

ROSE MARIE FLOYD and TERRY FLOYD, her husband, CONNIE GALE and MICHAEL GALE, her husband, MICHAEL GALE and CONNIE GALE, his wife, GLORIA PATTERSON, EDMOND PATTERSON, THOMAS J. NOLAN, ROBERT SCHARAG, EUGENE H. CHAMP, FREDERICK W. HOEHLER, IV, SALLY ANN COLLINS, MICHAEL R. DRAMIS, SANDY DIX and GARY DIX, her husband, DANA DIX, by and through her parents GARY DIX and SANDY DIX, as guardians and next friends, ALEXANDER DIX, by and through his parents GARY DIX and SANDY DIX, as guardians and next friends, GERRI ASH SELF, SUSAN ROONEY and WILLIAM ROONEY, her husband, JANET JACOBS and BRUCE JACOBS, her husband, ALEXANDER EMBRY, SALIM KHOURY and DEBORARH KHOURY, his wife, BRUCE JACOBS and JANET JACOBS, his wife, MYRIAM CARRASCO (f/k/a MYRIAM RILEY) TERRY FLOYD and ROSE MARIE FLOYD, GARY DIX and SANDY DIX, his wife, SALIM KHOURY and DEBORAH KHOURY, his wife, GREGORY MANTZ, by and through his parents, NETTA MANTZ and HAROLD D. MANTZ, as guardians and next friends NETTA MANTZ, HAROLD MANTZ, GREGORY D. MANTZ, by and through his father HAROLD D. MANTZ,

Plaintiffs-Appellants,

versus

EASTERN AIRLINES, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion ____, 11 Cir., 198__, ____F.2d____).

(January 11, 1990)

Before JOHNSON AND ANDERSON, Circuit Judges, and ATKINS*, Senior District Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:
/s/ [Illegible]
United States Circuit Judge

*Hon. C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.